TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 291

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MACK SAXON, ANCILLARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE IN TEXAS OF THE ESTATE OF J. W. MOORE, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED AUGUST 10, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,105)

( )

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[fol. 1]

IN DISTRICT COURT OF EL PASO COUNTY

At a term of the Sixty-fifth District Court, begun and holden within and for the County of El Paso, at El Paso, on the 4th day of March, A. D. 1929, and which adjourned on the 4th day of May, A. D. 1929, the Honorable Ballard Coldwell, Judge thereof, presiding, the following cause came on for trial, and the following proceedings were had therein, to-wit:

No. 29002

Mrs. Bertha Moore, Admrx.,

vs.

Atchison, Topeka and Santa Fe Railway Company

In the District Court of the 65th Judicial District of El Paso County, Texas

[title omitted]

Plaintiff's Original Petition—Filed January 23, 1928

To the Honorable Ballard Coldwell, Judge of said Court:

Mrs. Bertha Moore, Administratrix of the estate of J. W. Moore, deceased, suing for the use and benefit of herself and for the use and benefit of Mary Louise Moore and James Quentin Moore, minor children of herself and the deceased J. W. Moore, hereinafter styled plaintiff, complains of the Atchison, Topeka and Santa Fe Railway Company, hereinafter called defendant, and for cause of action respectfully represents:

1

That Mrs. Bertha Moore is the duly appointed qualified and acting administratrix of the estate of J. W. Moore, deceased, having been appointed such by the probate court of the County of Curry, State of New Mexico, a certified copy of letters of administration issued to her being hereto at-

[fol. 2] tached for reference and marked "Exhibit A." That the said Mrs. Bertha Moore and both of said minor children on the dates hereinafter mentioned were residents of the State of New Mexico and County of Curry.

2

That the defendant is a railroad corporation, duly incorporated and owning and operating a line of railroad in the County of El Paso, Texas, and having a local agent in El Paso, El Paso County, Texas, to-wit: R. F. Goering, upon whom service of citation may be had in this cause.

3

That on the dates herein mentioned, the defendant's railroad was a highway of interstate commerce, and the same was being operated by the defendant, and the defendant was a common carrier by railroad, engaged in commerce between the State of Texas and the State of New Mexico, and between the States of Texas, and the various other states of the United States of America, and that at the time the deceased J. W. Moore received the injuries hereinafter described, resulting in his death, he was employed by the defendant in such interstate commerce, and at the time he received his said injuries which resulted in his death was in the performance of duties relating to said interstate commerce, and the plaintiff alleges that this suit is brought by her for the use and benefit of herself and of the said named minor children.

4

The plaintiff alleges that on or about the 15th day of February, 1927, and long prior thereto, the defendant owned and operated a line of railroad running into and through Roosevelt County, New Mexico, and into and through a small station in said County, in said State, called Tolar, New Mexico, and that on said date and long prior thereto, the defendant was engaged in operating its trains over said line of railroad for the conveyance of passengers and freight, and that on said date, and for sometime prior thereto, the said J. W. Moore, deceased, was employed by the defendant, as a brakeman on its said line of railroad, and on its trains being operated over same; and as such

[fol. 3] brakeman, it became and was the duty of the deceased, J. W. Moore, to do and perform the duties usually and customarily performed by brakemen in such services, which duties, among other things, required deceased to get off and on the cars constituting the train, while the same were in motion, the same being customarily done by brakemen in such service; and while engaged in the performance of his work, and in the discharge of his duties, on the side, switch or passing track, at said Tolar, New Mexico, and while attempting to board the train, for the purpose of flagging and oncoming passenger train on the main line, he was caused to fall under said train and sustain serious injuries, which resulted immediately in his death. The plaintiff alleging further that the said train, upon which the deceased was working as a brakeman at said time and at said place, was pulling into the switch, side, or passing track, for the purpose of meeting and letting by a passenger train coming from the opposite direction, and that in pulling into said side or passing track, it was the duty of the deceased to flag the oncoming passenger train, in the event it should appear in sight, for the purpose of preventing the same from running into the said freight train before all of same had cleared the main line track, and in the discharge of this duty and in order that he might flag said passenger train as far up the track as possible, it then and there became the duty of the deceased to board the said freight train and ride the same as it proceeded on toward the further end of the said side or passing track.

And the plaintiff alleges that at said time and place, the deceased had thrown the switch, permitting the entrance of the said freight train onto said side or passing track, and had, with his flag in hand, as his duty required, proceeded up the main line track for the purpose of flagging the said oncoming passenger train, and that as the said freight train entered onto the said side or passing track, and proceeded to the other end of said track, the deceased, as required by his duty, crossed over to the side of said freight train for the purpose of boarding the same, and riding to the further [fol. 4] end of the side track, in order to be in better position to discharge the duties required of him, with reference to the flagging of said passenger train; and the plaintiff alleges that on the side of the passing track or switch track, next to the main line, there is a well marked and beaten

path, wherein brakemen and trainmen in discharge of like duties, undertaken as alleged herein by deceased, traveled, which was a place of work for the deceased and for others similarly engaged. And the plaintiff alleges that the deceased, in the discharge of his duties, was walking and running in this pathway, and while so engaged, by reason of the excessive and dangerous rate of speed of the train, and by reason of a large hole or soft place in said pathway, was caused to be thrown under said train, and was caused to fall under said train, as hereinabove alleged.

5

The plaintiff alleges that in order to flag the said passenger train, and thereby prevent the same from running into the freight train, and thereby save the destruction of property and life, it was the duty of the deceased to undertake the accomplishment of his work in the way herein alleged, and that this was well known to the defendant's employees in charge of said train and engine. And the plaintiff alleges that the defendant's said employees knew or in the exercise of ordinary care would have known that the deceased would have undertaken the discharge of his duties as herein alleged. The plaintiff alleges further in this connection that in addition to the duties requiring the deceased to undertake the discharge of his duties as herein alleged, there was a further duty requiring him to be at the further end of the train for the purpose of throwing the switch at said place.

6

The plaintiff alleges that the injuries to and the death of the deceased were directly and proximately caused by the negligence of the defendant in the following ways:

[fol. 5] (a) In the negligence of the defendant, its agents and employees in charge of said train and in charge of said engine, in running and operating the same at a high and excessive rate of speed and in jerking said train violently and hard, in view of the allegations made herein with reference to the duties of the deceased at the time.

(b) In the negligence of the defendant and its employees in causing or making a hole and depression in the pathway

herein described and in maintaining and keeping said pathway, with a large hole and depression and a large soft place in the same; said pathway being as herein alleged a place of work for brakemen and trainmen engaged in similar service to that in which the deceased was engaged at the time of his death.

(c) In the negligence of the defendant in failing to furnish the deceased a reasonably safe place to work.

(d) In the negligence of the defendant's employes in charge of said freight train in running on to the Tolar switch or sidetrack on what is known as "short time," that is, in running on to said Tolar switch or sidetrack or such time that the operatives in charge of said freight train did not have sufficient time, in the usual and ordinary operation of said train, to cause the said freight train so going in upon the said Tolar switch or sidetrack, to clear the main line at the point of entry on to said switch or sidetrack in time that an on-coming passenger train would pass said point without striking the said freight train.

7

Plaintiff alleges that the defendant knew or in the exercise of ordinary care would have known of the danger confronting the deceased by reason of the negligence herein alleged on the part of the defendant, and that the defendant did know or would have known in the exercise of ordinary care of the dangers confronting the deceased by reason of the negligent speed of said train and by reason of caus-
[fol. 6] ing and maintaining said hole and soft place in said pathway, but notwithstanding its duty in that behalf, negligently failed to alter, or in any way remedy the situation complained of.

Plaintiff alleges that the deceased was injured and killed without fault or negligence on his part and did not know and was not aware of the negligence of the defendant as herein complained of.

8

Plaintiff alleges that at the time of his death, as aforesaid, the said J. W. Moore was — years of age, in good health and well qualified for the discharge of his duties as

a brakeman and as a conductor, to which position he had been promoted, that he was an experienced brakeman and conductor, and qualified for the pursuit of that occupation, and had held a run for a long number of years, and by reason of his experience and qualifications and fitness, was in line for promotion and would have soon received such promotion, and that at the time of his death and prior thereto, he did thereby earn and receive the sum of $3,000.00 per year, and would have received with his promotion very much larger sums thereafter; that he had since his marriage with his wife, the said Mrs. Bertha Moore, worked for the support and maintenance of his family, consisting of the said Mrs. Bertha Moore and the two minor children above named, and that he has provided them with the necessities and comforts of life, and would have continued so to do, and would have educated his said children in a manner suitable to their station of life; that the deceased, J. W. Moore, was a man of exemplary habits, inclinations and conduct, and would have given to his children his assistance, care, training, advice and counsel during his life time and their minorities. [fol. 7] And the plaintiff alleges that the earnings of the deceased J. W. Moore were spent in the maintenance and support of his said wife and children and in the education of the latter. Plaintiff alleges that by reason of the premises, the parties for whose benefit this suit is brought have sustained actual damages in the sum of $50,000.00, for the recovery of which this suit is brought.

Wherefore plaintiff prays the Court that the defendant be cited to appear and answer herein, and that on hearing hereof, plaintiff have judgment for said sum of $50,000.00, that the same be apportioned among the parties entitled thereto in such shares as the court or jury may see fit, and for all costs of suit.

(Signed) Walker Saulsbury, Winbourn Pearce, Attorneys for Plaintiff.

"EXHIBIT A"

Letters of Administration

STATE OF NEW MEXICO,
County of Curry, ss:

To all to whom these presents shall come, Greeting:

Know ye that at a regular term of the Probate Court within and for the County and State aforesaid, held at the Court House in Clovis on the 8th day of April, in the year of our Lord Nineteen Hundred and Twenty-seven, Bertha Moore, of the County of Curry, in the State of New Mexico, was duly appointed to be Administratrix of the goods, chattels, monies, and effects of J. Wesley Moore, deceased, late of said County, with full power and authority to administer the same in accordance with the statute in such cases made and provided; and the said Bertha Moore, having duly qualified as such administratrix by the execution of bond, and filing the oath required by law these letters of administration are issued to her as evidence of such authority by order of the said Probate Court.

[fol. 8] Witness the Hon. H. M. Pile, Judge of the Court aforesaid, and the seal of said Court, this 8th day of April, 1927.

(Signed) Carl E. Osborn, County Clerk, by ——— ———, Deputy.

STATE OF NEW MEXICO,
County of Curry, ss:

I, Carl E. Osborn, County Clerk and Ex-officio Clerk of the Probate Court within and for the County and State aforesaid do hereby certify that the foregoing is a true and correct copy of the original letters of administration issued in the above entitled and numbered cause.

In witness whereof I have hereunto set my hand and affixed by official seal this the 6th day of July, A. D. 1927.

(Signed) Carl E. Osborn, County Clerk & ex-officio Clerk of the Probate Court, Curry County, N. M.
(Probate Court Seal.)

[fol. 9] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS,
SIXTY FIFTH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER—Filed September 26, 1928

Comes now defendant, leave of Court first obtained, and files this, its first amended original answer to the cause of action asserted by the plaintiff, Mrs. Bertha Moore, Administratrix, and in answer to the plea of intervention herein filed by Mack Saxon, Ancillary Administrator, and as for such answers defendant represents:

I

Said defendant excepts to said petitions, and each of them, represents that they state no cause of action, and prays judgment of the court.

II

For answer if required to said causes of action, and each of them, said defendant denies each and singular the allegations therein respectively averred, says same are not true in fact, and of this puts itself upon the country.

(Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant.

III

Specially answering herein if required, this defendant represents that neither the original plaintiff nor the intervenor should recover herein for this: Deceased was an experienced employee and brakeman, who understood the dangers of the employment in which he had engaged. He knew the locations and purpose of the train movement at the time of and prior to the accident in question. He knew that a passenger train was approaching, and that the freight train of which he was a brakeman was taking the siding [fol. 10] for the purpose of permitting the passenger train to pass. He knew the character of the ground and the

pathway beside the track. All of same was clearly visible, and his opportunities for observing the same were better than that of anyone else connected with the train movement. He knew the speed of the passing freight train. He was in a better position to know than anyone else whether he could safely mount the same at the time he undertook to do so, if he did. He exercised his own judgment in that behalf, was acting under the direction of no one, nor was he called upon to get on the train at the time he undertook to do so. No other employee at that time and place knew that he intended to try to get on the train as he did and when he did. He voluntarily assumed to do so, and that without necessity. It was not even suspected by others of the crew that he would attempt to get on the train at the time, nor under the circumstances that he so attempted, if he did. No other employee connected with the train movement saw him make the effort, and if he did make the effort it was to serve a purpose of his own, and was not under the circumstances then prevailing in discharge of any duty that he owed to the defendant. It was not expected that he would attempt to do otherwise than get on the caboose. All the employees knew that this freight train was taking the siding, and that when in the clear it would stop in order to permit the passenger train to pass. The only duty, if it was such, that deceased was under to the defendant was that after the passenger train had passed, and the freight train had assumed its position on the main line, to throw the switch connecting same safely with the main line, and in the discharge of that duty he was taking no risk or chance.

It is herein further averred that each of the ways and works connected with the defendant's right-of-way at that time and place were in a reasonably safe condition, and indeed in such condition as to permit the discharge of any duty of an employee of the defendant to be performed safely.

[fol. 11] All of these things were known to the defendant, and if he put himself in the position of peculiar danger, he did so voluntarily and without direction. Deceased knew the speed of the train at the time he attempted get on the car, and was in a better position than anyone else to know whether he could accomplish that purpose in safety.

Each and all of these facts are herein plead and constitute assumed risk on the part of the deceased, and the assumed risk of the deceased as hereinabove averred in the method and manner of the performance of his work at the time and place of accident are here and now plead in bar of recovery against the alleged causes of action averred by the original plaintiff and the intervenor, and each of them.

IV

This defendant, without the necessity of repetition, herein avers each of the facts set up in the paragraph next above, and thereon represents that the deceased was not in the exercise of ordinary care at the time and place of the accident, that he was guilty of negligence in attempting to get on the train at the time he did; that he was serving no useful purpose and one not called for under the circumstances then existing; he knew each and all the surroundings and what was intended to be accomplished by the freight train in question, and defendant avers that these facts constitute negligence upon the part of the deceased, and this negligence is here and now plead as a bar to recovery, it being again in this behalf stated that the defendant was guilty of no negligence at the time and place of the accident, did no act or thing out of the ordinary, that no act of the defendant, or of any other employee there engaged contributed to the injury and the resulting death of the deceased, and these facts are plead in bar of recovery.

[fol. 12] (Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant.

(Endorsed:) No. 29002. District Court of El Paso Co., Texas, 65th Judicial District. Mrs. Bertha Moore, Administratrix, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, Defendant. Defendant's First Amended Original Answer. Filed this 26th day of September, A. D. 1928. C. W. Harper, Clerk District Court, El Paso Co., Texas. John R. Cobb, Deputy.

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

[Title omitted.]

APPLICATION OF ANCILLARY ADMR. TO INTERVENE AND COURT'S ORDER ALLOWING—Filed March 24, 1928

To the Honorable Judge of said Court:

Comes now, Mack Saxon, a resident of El Paso County, Texas, and respectfully shows to the Court:

That he is the duly and legally qualified ancillary administrator and personal representative in Texas of the estate of J. Wesley Moore, deceased, having been appointed as such by the Probate Court of El Paso County, Texas, on the 16th day of March, A. D. 1928:

And that by and under the terms of such appointment and order of the Court, it was ordered, decreed and adjudged that he be empowered and authorized to intervene in the above numbered and styled cause, with power and authority to employ counsel to represent him and said estate, and to maintain and prosecute, fully and generally, to final settlement, compromise or judgment, through any and all courts necessary, either in El Paso County, or in some other county, having jurisdiction of the same said above numbered and styled suit vs. the defendant, The Atchison, Topeka and Santa Fe Railway Company; that in said suit, Mrs. Bertha Moore, administratrix, for the use [fol. 13] and benefit of herself and for the use and benefit of her minor children, Mary Louise Moore and James Quentin Moore, has sued said railway company to recover the sum of Fifty Thousand Dollars ($50,000.00) damages for the alleged negligent killing of the intestate, J. W. Moore, while engaged in interstate commerce, by said railway company, its agents and employees, that the said Mrs. Bertha Moore is the qualified administratrix of said estate in the State of New Mexico, wherefore the necessity of the prosecution of said suit by him, the said ancillary administrator and personal representative of said estate in the State of Texas; and that he has an interest in said above numbered and styled suit and in the subject matter in controversy, and is entitled to intervene therein.

Wherefore, applicant prays the court that he be granted leave to intervene in the above styled and numbered matter, and fully to present his plea in intervention, in accordance with his interest and the facts in said controversy and suit, and the powers conferred on him by the Probate Court of El Paso County, Texas, and for such other orders herein as it may be merited.

(Signed) Mack Saxon, Ancillary Administrator and Personal Representative in Texas of the Estate of J. Wesley Moore, Deceased.

On this the 24th day of March, A. D. 1928, came on to be heard and considered the above and foregoing application by Mack Saxon, ancillary administrator and personal representative in Texas, of the estate of J. Wesley Moore, deceased, to intervene in cause styled, Mrs. Bertha Moore, Administratrix, vs. Atchison, Topeka and Santa Fe Railway Company, numbered 29002 on the docket of this court, and, after consideration of same, the same is granted and ordered, in all things, fully as prayed for.

(Signed) Ballard Coldwell, Judge of the 65th District Court of El Paso County, Texas.

[fol. 14] IN THE 65TH DISTRICT COURT OF EL PASO COUNTY

[Title omitted]

PETITION OF INTERVENTION OF MACK SAXON, ADMR.—Filed March 24, 1929

To the Honorable Ballard Coldwell, Judge of said Court:

Now comes Mack Saxon, ancillary administrator and personal representative, in Texas, of the estate of J. Wesley Moore, deceased, suing for the use and benefit of Bertha Moore, surviving wife of said deceased J. Wesley Moore, and for the use and benefit of Mary Louise Moore and James Quentin Moore, minor children of herself and the deceased, J. Wesley Moore, hereinafter styled intervener with leave of court first had and obtained of and from the Court, files this his petition in intervention, and complains of the Atchison, Topeka and Santa Fe Railway Company,

hereinafter called defendant, and for cause of action respectfully represents:

1

That he, Mack Saxon, is the duly appointed, qualified and acting ancillary administrator and personal representative, in Texas, of the estate of J. Wesley Moore, deceased, having been appointed such by the county court of El Paso County, Texas, on the 16th day of March, A. D. 1928, that he is a resident citizen of El Paso County, Texas, and a certified copy of letters of administration, issued to him, [fol. 15] are hereto attached for all material purposes and marked "E. A."

2

That the defendant is a railroad corporation, duly incorporated and owning and operating a line of railroad in the County of El Paso, Texas, and having a local agent in El Paso, El Paso County, Texas, to-wit: R. F. Goering, upon whom service of citation may be had in this cause.

3

That on the dates herein mentioned, the defendant's railroad was a highway of interstate commerce, and the same was being operated by the defendant, and the defendant was a common carrier by railroad, engaged in commerce between the State of Texas and the State of New Mexico, and between the State of Texas, and the various other states of the United States of America, and that at the time the deceased J. W. Moore received the injuries hereinafter described, resulting in his death, he was employed by the defendant in such interstate commerce, and at the time he received his said injuries which resulted in his death was in the performance of duties relating to said interstate commerce, and the intervenor alleges that this suit is brought by him for the use and benefit of said Bertha Moore and of the said named minor children.

4

The intervenor alleges that on or about the 15th day of February, 1927, and long prior thereto, the defendant owned and operated a line of railroad running in and

through Roosevelt County, New Mexico, and into and through a small station in said County, in said State, called Tolar, New Mexico, and that on said date and long prior thereto, the defendant was engaged in operating its trains over said line of railroad for the conveyance of passengers and freight, and that on said date, and for sometime prior thereto, the said J. W. Moore, deceased, was em- [fol. 16] ployed by the defendant, as a brakeman on its said line of railroad, and on its trains being operated over same; and as such brakeman, it became and was the duty of the deceased, J. W. Moore, to do and perform the duties usually and customarily performed by brakemen in such services, which duties among other things, required deceased to get off and on the cars constituting the train, while the same were in motion, the same being customarily done by brakemen in such service; and while *ne*gaged in the performance of his work, and in the discharge of his duties, on the side, switch or passing track, at said Tolar, New Mexico, and while attempting to board the train, for the purpose of flagging an oncoming passenger train on the main line, he was caused to fall under said train and sustain serious injuries, which resulted immediately in his death. The Intervenor alleging further that the said train upon which the deceased was working as a brakeman at said time and at said place, was pulling into the switch, side, or passing track, for the purpose of meeting and letting by a passenger train coming from the opposite direction, and that in pulling into said side or passing track, it was the duty of the deceased to flag the oncoming passenger train, in the event it should appear in sight, for the purpose of preventing the same from running into the said freight train before all of same had cleared the main line track, and in the discharge of this duty and in order that he might flag said passenger train as far up the track as possible, it then and there became the duty of the deceased to board the said freight train and ride the same as it proceeded on toward the further end of the said side or passing track.

And the intervenor alleges that at said time and place, the deceased had thrown the switch, permitting the entrance of the said freight train onto said side or passing track, and had, with his flag in hand, as his duty required, pro- [fol. 17] ceeded up the mainline track for the purpose of flagging the said oncoming passenger train, and that as the

said freight train entered on to the said side or passing track, and proceeded to the other end of said track, the deceased, as required by his duty, crossed over to the side of said freight train for the purpose of boarding the same, and riding to the further end of the side track, in order to be in better position to discharge the duties required of him, with reference to the flagging of said passenger train; and the plaintiff alleges that on the side of the passing track or switch track, next to the main line, there is a well marked and beaten path, wherein brakemen and trainmen in discharge of like duties, undertaken as alleged herein by deceased, traveled, which was a place of work for the deceased and for others similarly engaged. And the plaintiff alleges that the deceased, in the discharge of his duties, was walking and running in this pathway, and while so engaged, by reason of the excessive and dangerous rate of speed of the train, and by reason of a large hole or soft place in said pathway, was caused to be thrown under said train, and was caused to fall under said train, as hereinabove alleged.

5

The intervener alleges that in order to flag the said passenger train, and thereby prevent the same from running into the freight train, and thereby save the destruction of property and life, it was the duty of the deceased to undertake the accomplishment of his work in the way herein alleged, and that this was well known to the defendant's employees in charge of said train and engine. And the intervener alleges that the defendant's said employees knew or in the exercise of ordinary care would have known that the deceased would have undertaken the discharge of his duties [fol. 18] as herein alleged. The intervener alleges further in this connection that in addition to the duties requiring the deceased to undertake the discharge of his duties as herein alleged, there was a further duty requiring him to be at the further end of the train for the purpose of throwing the switch at said place.

6

The plaintiff alleges that the injuries to and the death of the deceased were directly and proximately caused by the negligence of the defendant in the following ways:

(a) In the negligence of the defendant, its agents and employees in charge of said train and in charge of said engine, in running and operating the same at a high and excessive rate of speed and in jerking said train violently and hard, in view of the allegations made herein with reference to the duties of the deceased at the time.

(b) In the negligence of the defendant and its employes in causing or making a hole and depression in the pathway herein described and in maintaining and keeping said pathway with a large hole and depression and a large soft place in the same, said pathway being as herein alleged a place of work for brakemen and trainmen engaged in similar service to that in which the deceased was engaged at the time of his death.

(c) In the negligence of the defendant in failing to furnish the deceased a reasonably safe place to work.

(d) In the negligence of the defendant's employes in charge of said freight train in running on to the Tolar switch or sidetrack on what is known as "short time", that is, in running on to said Tolar switch or sidetrack on such time that the operatives in charge of said freight train did not have sufficient time, in the usual and ordinary operation of said train, to cause the said freight train so going in upon the said Tolar switch or sidetrack, to clear [tol. 19] the main line at the point of entry on to said switch or sidetrack in time that an on-coming passenger train would pass said point without striking the said freight train.

7

Intervener alleges that the defendant knew or in the exercise of ordinary care would have known of the danger confronting the deceased by reason of the negligence herein alleged on the part of the defendant, and that the defendant did know or would have known in the exercise of ordinary care of the dangers confronting the deceased by reason of the negligent speed of said train and by reason of causing and maintaining said hole and soft place in said pathway, but notwithstanding its duty in that behalf, negligently failed to alter, or in any way remedy the situation complained of.

Intervener alleges that the deceased was injured and killed without fault or negligence on his part and did not know and was not aware of the negligence of the defendant as herein complained of.

8

Intervener alleges that at the time of his death, as aforesaid, the said J. W. Moore was 40 years of age, in good health and well qualified for the discharge of his duties as a brakeman and as a conductor, to which position he had been promoted, that he was an experienced brakeman and conductor, and qualified for the pursuit of that occupation, and had held a run for a long number of years, and by reason of his experience and qualifications and fitness, was in line for promotion and would have soon received such promotion, and that at the time of his death and prior thereto, he did thereby earn and receive the sum of $3,000.00 per year, and would have received with his promotion very much larger sums thereafter; that he had since his marriage with his wife, the said Mrs. Bertha Moore, worked [fol. 20] for the support and maintenance of his family, consisting of the said Mrs. Bertha Moore and the two minor children above named; and that he has provided them with the necessities and comforts of life, and would have continued so to do, and would have educated his said children in a manner suitable to their station in life; that the deceased J. W. Moore was a man of exemplary habits, inclinations and conduct, and would have given to his children his assistance, care, training, advice and counsel during his life time and their minorities. And the plaintiff alleges that the earnings of the deceased J. W. Moore were spent in the maintenance and support of his said wife and children and in the education of the latter. Intervener alleges that by reason of the premises, the parties for whose benefit this suit is brought have sustained actual damages in the sum of $50,000.00, for the recovery of which this suit is brought.

Wherefore intervener prays that on the hearing hereof he have and recover judgment of and from the defendant for the said sum of $50,000.00, that the same be apportioned

among the parties entitled thereto in such shares as the court or jury may see fit, and for all costs of suit.

(Signed) Mack Saxon, Intervener (Ancillary Administrator and Personal Representative in Texas of Estate of J. Wesley Moore, Deceased). (Signed) Winbourn Pearce; Walker Saulsbury, Attorneys for Intervener.

(Endorsed:) No. 29002. In the 65th District Court of El Paso County, Texas. Mrs. Bertha Moore, Admx., vs. The Atchison, Topeka and Santa Fe Railway Co. Pleadings of Intervener, Mack Saxon. Filed this 24th day of March, A. D. 1928. C. W. Harper, Clerk District Court, El Paso Co., Texas.

[fol. 21] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

CHARGE OF THE COURT—Filed April 19, 1929

GENTLEMEN OF THE JURY: This case is submitted to you upon special issues, that is, it is submitted to you in the form of questions that you will be required to answer, and your several answers to the questions propounded to you will constitute your verdict.

You will answer each of the questions and sign the same by your Foreman and return the same into court.

In connection with the questions propounded to you, such legal definitions and statements of the law are given to you as are deemed by the court necessary to assist you in arriving at the proper answers to the questions propounded.

1

Negligence, as a law term, means the want of ordinary care; that is, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

2

Contributory negligence, as a law phrase, means such act or omission on the part of a plaintiff as an ordinarily prudent person would not do or suffer to be done under the same or similar circumstances, which, concurring with the negligent act or omission of a defendant, becomes a proximate cause of an injury.

[fol. 22]

3

By proximate cause is meant an efficient cause without which the injury would not have happened, and from which danger of injury might reasonably have been anticipated as a natural and probable consequence.

4

An employe of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of, or would have known of in the ordinary discharge of the duties of his service; but risks arising from the negligence of the company's servants or employees are not assumed by an employe, unless he knows of them, or must necessarily have know of them in the ordinary discharge of the duties of his service and in the exercise of ordinary care for his own safety, and until then he has a right to assume that risks arising from such negligence do not exist.

5

You are charged that any fact before you may be established by circumstantial or direct evidence or both.

You will please return your answers to the following questions:

Question No. 1. Do you find from a preponderance of the evidence that, at the time and place alleged by the plaintiff, there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff? Answer yes or no.

If you answer the preceding question in the affirmative, then answer:

Question No. 2. Do you find from a preponderance of the evidence that the deceased, J. W. Moore, was running along the track, as alleged by plaintiff, and that while doing so and attempting to board one of the cars with which he was working, he stepped on or upon such a soft area or hole, if any, and was thereby caused to fall and be [fol. 23] injured, as alleged by plaintiff?

If you answer Question No. 1 in the affirmative, then answer:

Question No. 3. Do you find from a preponderance of the evidence that the presence of such soft area or hole, if any, was due to the negligence of the defendant?

You are charged that it is the duty of the defendant to use ordinary care to provide a reasonably safe place for its employes to work, and a failure to use such care would be negligence.

If you answer the preceding question in the affirmative, then answer:

Question No. 4. Was such negligence, if any, a proximate cause of the accident and injury to the deceased, J. W. Moore?

Question No. 5. Did the deceased, J. W. Moore, know of such soft area or hole, if any, or by the use of ordinary care, incident to his employment, would he have known of such soft area or hole?

If you answer the preceding question in the negative, then answer:

Question No. 6. Do you find that the accident or injury to the deceased, complained of, was due to some other of the risks of the employment assumed by the deceased?

Question No. 7. What sum do you find, if paid now, would reasonably compensate the widow and children of the deceased for the damages sustained by them?

In estimating the damages, if any, you will take into consideration the pecuniary loss suffered by the wife and children of the deceased, and not take into consideration any damages suffered by them by reason of grief, loss of companionship or sorrows, or for solace. In estimating the damages, if any, you may consider the reasonable pecuniary value, if any, of the care, advice, and training if any, you

may believe from a preponderance of the evidence the chil-
[fol. 24] dren of deceased would have received from him during their minorities, had he lived.

You are the exclusive judges of the credibility of the witnesses and the weight to be given the testimony, but you are not the judges of the law. The law of this case you will take from the charges given you.

(Signed) Ballard Coldwell, Judge.

(Endorsed:) No. 29002. Mack Saxon, Admr. vs. Atchison, Topeka and Santa Fe Railway Company. Charge of the Court. Filed this 19th day of April A. D. 1929. C. W. Harper, Clerk District Court, El Paso Co., Texas. John R. Cobb, Deputy.

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S EXCEPTION TO CHARGE OF COURT—Filed April 19, 1929

Comes now the defendant, at the conclusion of the evidence and before the argument, in the cause, and within a reasonable time after the court had submitted to counsel the charge and special issues to be given herein, and objects and excepts to the same as follows:

I

To the Paragraph 4 thereof as to the definition of assumed risk. The same under the facts of this case is misleading, and does not indicate to the jury the real risks assumed by an employee under such circumstances as existed on the occasion in question. Said definition is too restricted. The employee not only assumes the risks of the dangers ordinarily incident to his service, but as applied to his place of work, he assumes all the dangers which are obvious, or as well known to the employee as to
[fol. 25] the master, as well as extraordinary risks, or due to the negligence of the employer if same are obvious.

The definition is also misleading in that there is no evidence that any of the company's employees were negligent relative to the place in between the two railway tracks.

II

To the statement in the 5th paragraph that a fact might be established by circumstantial evidence, because same imposed too great a burden upon the defendant herein, there were no such circumstances in evidence as called for such a definition.

III

To the question No. 1 propounded, because same is upon an immaterial issue in this case; there is no evidence that there was a hole at any point between the tracks at or about the place of accident. The evidence fails to indicate any negligence in the defendant company, or negligence for which it would be responsible in the condition of the ground in between the tracks, or that the defendant owed to the deceased any duty on the occasion in question relative thereto.

IV

To the Question No. 2, because same is on the weight of the evidence and has no evidence to sustain it, in that there is no evidence that deceased was running along the track and while so doing attempting to board one of the cars with which he was working. There is an entire absence of evidence as to what the deceased was doing at the time and place of accident, or why he was doing it, and under the evidence it was immaterial whether or not he was attempting to board one of the cars. He had no duty to perform relative thereto, and was not expected to get on any car while same was moving through the passing track, nor is [fol. 26] there any evidence that he did step in a soft area or hole, or that same had anything to do with the accident in question. The court by this question submits an issue that has no evidence to sustain it, and thereby indicates to the jury that in the mind of the court liability could be predicated upon an affirmative answer to this question.

V

To the Question No. 3 because the evidence is too indefinite to justify the submission of such an issue, and there is no sufficient evidence to warrant the jury in concluding as a question of fact as to whether the conditions there were due to negligence.

The place in between the tracks was a part of the way of the railway company. There is nothing to indicate how long the condition then existing had existed, nothing to indicate a lack of knowledge on the part of the deceased of the conditions. The entire evidence affecting this, as well as the Question No. 2, is too indefinite and hazy to warrant the court in asking the jury to determine from the same what the facts were. There is nothing to indicate that the conditions along between the tracks at this place were different than at any other places similarly situated along the line of road.

VI

To the question No. 4 because there is no evidence showing how the accident happened, and in these circumstances it was useless to ask the jury as to what was the proximate cause of the accident. The burden was upon the plaintiff in this case to show that the death of the deceased was due to the negligence of the railway company. Neither the jury nor the court may indulge in surmise. We are left to conjecture as to how the accident happened, and any answer made by the jury to this question No. 4 would be based wholly upon insufficient evidence and would have no evidence to sustain it.

[fol. 27]

VII

To the question No. 5, because same was too restrictive. If there was a soft area or hole, and same was obvious, it was the duty of the deceased to observe it and to protect himself, and under the question submitted the defendant is not permitted to have the benefit of the defense of assumed risk as same arises under the facts of this case.

There is nothing to indicate that the operation at the time of the accident was out of the ordinary, and that the

things done by them were other than those in the usual course of business, and under these circumstances it was the duty of the court to charge, as a matter of law, that the deceased assumed the risk. It was the duty of the court to say that the plaintiff had not established under the facts of this case any negligence against the railway company which was a proximate cause of the injury.

This objection goes to the entire charge, and to all the issues submitted, and because of which a motion for an instructed verdict, as well as the peremptory charge requested by the defendant should either one or both have been given.

And now the defendant presents the above as its objections and asks that the same be filed as its bill of exceptions to the Court's charge and special issues submitted, which is accordingly done.

(Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant.

O. K. (Signed) Ballard Coldwell, Judge.

[fol. 28] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT—Filed April 19, 1929

Comes now the defendant, at the conclusion of the evidence, and moves the court to direct a verdict in its favor.

There has been a total failure of the evidence to indicate that the accident was the result of any negligence on the part of the defendant. The evidence wholly fails to indicate how the accident happened or what the deceased was attempting to do at the time of the accident. The burden was on the plaintiff to establish these facts, and there is, to say the least, nothing more than a scintilla of evidence on any of the material questions involved. The evidence plainly discloses that the deceased assumed the risk of the conditions confronting him at the time and place of accident; that there was no occasion for him to attempt to get on the moving freight train, and that in making such at-

tempt, if he did do so, it was for a purpose not necessary under his employment.

(Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant.

4/19/29. Overruled.

(Signed) Ballard Coldwell, Judge.

[fol. 29] In the District Court of El Paso County, Texas, Sixty-fifth Judicial District

[Title omitted]

Defendant's Special Charge No. One—Filed Apr. 19, 1929

Defendant requests the court to give following charge to jury.

The jury is directed to return a verdict in favor of the defendant.

(Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant.

Refused.

(Signed) Ballard Coldwell, Judge.

(Endorsed:) No. 29002, Max Saxon, Admr. vs. A. T. & S. F. Ry. Company. Defendant's special charge No. One. Filed this 19th day of April, A. D. 1929. C. W. Harper, Clerk District Court, El Paso Co., Texas. John R. Cobb, Deputy.

In the District Court of El Paso County, Texas, Sixty-fifth Judicial District

[Title omitted]

Verdict—Filed April 19, 1929

We, the Jury in the above styled and numbered cause, return the following answers to the questions submitted by the court:

Answer to Question No. 1: Yes.
Answer to Question No. 2: Yes.
Answer to Question No. 3: Yes.
Answer to Question No. 4: Yes.
Answer to Question No. 5: No.
[fol. 30] Answer to Question No. 6: No.
Answer to Question No. 7: $15,000, Fifteen Thousand.
(Signed) H. O. Marshall, Foreman.

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS,
SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT—Filed May 2, 1929

To the Honorable Ballard Coldwell, Judge of said Court:

Comes now Mack Saxon, ancillary administrator and personal representative in Texas of the estate of J. W. Moore, deceased, Intervener, suing herein for the use and benefit of Mrs. Bertha Moore, James Quentin Moore and Mary Louise Moore, surviving wife and children of the deceased, J. W. Moore, and respectfully shows to the Court that heretofore on April 18th, 1929, at a regular term of this court, the above styled and numbered cause came on for trial, and thereupon both parties, by their attorneys, announced ready; that thereafter H. O. Marshall and eleven others, qualified jurors, were selected and sworn to try this cause; that, after the presentation of the evidence, the Court submitted the following charge, upon special issues, which issues and the jury's respective answers thereto are as follows:

"Question No. 1. Do you find from a preponderance of the evidence that, at the time and place alleged by the [fol. 31] plaintiff, there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff? Answer yes or no.

If you answer the preceding question in the affirmative, then answer:

Question No. 2. Do you find from a preponderance of the evidence that the deceased, J. W. Moore, was running along

and attempting to board one of the cars with which he was working, he stepped on or upon such soft area or hole, if any, and was thereby caused to fall and be injured, as alleged by plaintiff?

If you answer Question No. 1 in the affirmative, then answer:

Question No. 3. Do you find from a preponderance of the evidence that the presence of such soft area or hole, if any, was due to the negligence of the defendant?

You are charged that it is the duty of the defendant to use ordinary care to provide a reasonably safe place for its employes to work, and a failure to use such care would be negligence.

If you answer the preceding question in the affirmative, then answer:

Question No. 4. Was such negligence, if any, a proximate cause of the accident and injury to the deceased, J. W. the track, as alleged by plaintiff, and that while doing so Moore?

Question No. 5. Did the deceased, J. W. Moore, know of such soft area or hole, if any, or by the use of ordinary care, incident to his employment, would he have known of such soft area or hole?

If you answer the preceding question in the negative, then answer:

Question No. 6. Do you find that the accident or injury to the deceased, complained of, was due to some other of the risks of the employment assumed by the deceased?

[fol. 32] Question No. 7. What sum do you find, if paid now, would reasonable compensate the widow and children of the deceased for the damages sustained by them?

That said jury answered said special issues as follows:

Question No. 1: Yes.
Question No. 2: Yes.
Question No. 3: Yes.
Question No. 4: Yes.
Question No. 5: No.
Question No. 6: No.
Question No. 7: $15,000.00.

(Signed) H. O. Marshall, Foreman.

That the jury, in response to said special issues, having found in favor of the intervener, who occupies the position

of plaintiff in this case, as against the defendant, the intervener, for the use and benefit of said parties, is entitled to have judgment rendered in his favor and respective capacity for the amount found by the jury to have been the damages sustained by said widow and children, which amount is fifteen thousand and no/100 (15,000) Dollars.

Wherefore intervener, for the use and benefit of said parties, hereby prays the court to enter judgment in his favor for said amount of Fifteen Thousand and no/100 (15,000) Dollars, together with all costs in this behalf incurred, and together with six per cent interest per annum upon the amount of said judgment from said April 19th, 1929, and for such other relief as may be merited.

(Signed) Mack Saxon, Intervener, Ancillary Administrator and Personal Representative in Texas of the Estate of J. W. Moore, Deceased, by (Signed) Walker Saulsbury, Winbourn Pearce, Attorneys for Plaintiff.

[fol. 33] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT AFTER VERDICT—Filed April 20, 1929

Comes now the defendant, and represents that it is entitled to a judgment herein, notwithstanding the answers of the jury to the questions propounded by the Court; that as a matter of law there was no liability herein, the deceased assumed the risks, no actionable negligence was shown against the defendant, the evidence was wholly inadequate to show how and in what manner deceased met his death, there was no evidence indicating what caused the accident, the evidence was wholly insufficient to warrant the submission of the issues that were answered by the jury and the answers of the jury were based so largely upon surmise that same is not supported by the evidence. It is necessary to build one presumption upon another before any conclusion could be reached as to the manner of the death of the deceased, and the plaintiff did not produce

evidence sustaining the burden of proof as required under the Court's charge, and because of each and all of these reasons the defendant is entitled to judgment herein, which is now prayed for.

(Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant.

[fol. 34] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

JUDGMENT—Entered April 20, 1929

On the 18th day of April, A. D. 1929, the above styled and numbered cause came on for trial, wherein Mack Saxon, Ancillary Administrator and personal representative in Texas of the estate of J. W. Moore, deceased, intervener, sues for the use and benefit of Mrs. Bertha Moore, James Quentin Moore and Mary Louise Moore, surviving wife and children of the said deceased, J. W. Moore, occupying the position of plaintiff as against the defendant, Atchison, Topeka and Santa Fe Railway Company, and thereupon appeared the parties, by their respective attorneys and announced ready for trial, and H. O. Marshall and eleven other qualified men were duly selected, qualified and impanelled as a jury and sworn, and the matters of fact involved having been submitted to said jury, in form of special issues; and it appearing to the court that said jury made response, on April 19th, 1929, to said issues propounded them in favor of the intervener, as follows:

[fol. 35] "Question No. 1. Do you find from a preponderance of the evidence that, at the time and place alleged by the plaintiff, there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff? Answer yes or no. If you answer the preceding question in the affirmative, then answer:

Question No. 2. Do you find from a preponderance of the evidence that the deceased, J. W. Moore, was running along the track, as alleged by plaintiff, and that while doing so and attempting to board one of the cars with which he was working, he stepped on or upon such soft area or hole, if

any, and was thereby caused to fall and be injured, as alleged by plaintiff?

If you answer Question No. 1 in the affirmative, then answer:

Question No. 3. Do you find from a preponderance of the evidence that the presence of such soft area or hole, if any, was due to the negligence of the defendant?

If you answer the preceding question in the affirmative, then answer:

Question No. 4. Was such negligence, if any, a proximate cause of the accident and injury to the deceased, J. W. Moore?

Question No. 5. Did the deceased, J. W. Moore know of such soft area or hole, if any, or by the use of ordinary care, incident to his employment, would he have known of such soft area or hole?

If you answer the preceding question in the negative, then answer:

Question No. 6. Do you find that the accident or injury to the deceased, complained of, was due to some other of the risks of employment assumed by the deceased?

Question No. 7. What sum do you find, if paid now, would [fol. 36] reasonably compensate the widow and children of the deceased for the damages sustained by them?

That said jury answered said special issues as follows:

"Question No. 1: Yes.
Question No. 2: Yes.
Question No. 3: Yes.
Question No. 4: Yes.
Question No. 5: No.
Question No. 6: No.
Question No. 7: $15,000.00.

(Signed) H. O. Marshall, Foreman."

Which said answers were received by the Court and the jury discharged;

Whereupon, the intervenor, for the use and benefit of the said parties, and the defendant Atchison, Topeka and Santa Fe Railway Company, having each submitted to the court their respective motions for judgment herein, and said motions having each been considered by the court:

Now, in this the 2nd day of May, 1929, the court being of the opinion that the motion for judgment as herein filed by the defendant, Atchison, Topeka & Santa Fe Railway Company is not well taken and should be overruled, same is therefore overruled, and to the order of the Court in so overruling said motion the said defendant, Atchison, Topeka & Santa Fe Railway Company in open court duly excepted, and the court being of the opinion that *that* the motion as filed by the intervenor is well taken, and that judgment should be entered herein in favor of the said intervenor for the use and benefit of the said Mrs. Bertha Moore, James Quentin Moore and Mary Louise Moore, surviving wife and children of the deceased J. W. Moore, in accordance with the answers of the jury to the special issues so submitted;

It is, therefore, considered, ordered and adjudged by the [fol. 37] court that the intervenor Mack Saxon, personal representative in Texas and Ancillary Administrator of the estate of J. W. Moore, deceased, for the use and benefit of the said Mrs. Bertha Moore, James Quentin Moore and Mary Louise Moore do have and recover of and from the defendant Atchison, Topeka & Santa Fe Railway Company the sum of Fifteen Thousand Dollars ($15,000.00), being the amount of the damages assessed by said jury, together with interest thereon at the rate of six per cent (6%) per annum from this date until paid, together with all costs in this behalf expended, and for all of which said intervenor, for the use and benefit of said above named parties, may have his execution.

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S AMENDED MOTION FOR A NEW TRIAL—Filed May 2, 1929

Comes now the defendant Atchison, Topeka and Santa Fe Railway Company, leave of court first obtained, and files this, its amended motion for a new trial, and thereon complains of the following errors:

I

The court erred in refusing to grant and sustain the motion for an instructed verdict, as requested by the defendant.

II

The court erred in failing and refusing to give the peremptory charge requested by the defendant.

III

The court erred in its definition of "assumed risk", as set out and contained in the fourth paragraph of its charge [fol. 38] to the jury. Te definition as therein set out was entirely too restricted, and thereby the defendant was deprived of the benefit of the defense of assumed risk as same arose under the facts of this case. Reference is here made to the objection and exception of the defendant to this paragraph of the Court's charge.

IV

The Court erred in the fifth paragraph of his charge in the statement that any fact could be established by circumstantial or direct evidence, or both. This statement from the court was misleading, and therefrom the jury was warranted in determining for itself what might be considered circumstantial evidence; the Court gave no direction as to the probative force of that character of evidence, and the necessity for each link in its chain to dovetail, the one with the other.

V

The Court erred in submitting its Question No. 1 to the jury, because same was upon an immaterial issue in this cause, and an affirmative finding in response thereto could not add to nor take from the rights of the parties plaintiff and defendant. Reference is here made to the objections made by the defendant to this question when the Court's charge was submitted to counsel.

VI

The Court erred in submitting its question No. 2 to the jury. The evidence was entirely too indefinite and unsatisfactory to warrant the submission of that issue. There was no evidence showing what deceased was doing at the time of the accident, and the cause of the accident was not disclosed by the evidence. In order to warrant the submission of a material issue there must be substantial evidence justifying it, and there was no substantial evidence to justify the inquiry made basis of this question. [fol. 39] Reference is here made to the objections and exceptions of the defendant to this question, as taken by the defendant when the Court's charge was submitted to counsel.

VII

The Court erred in submitting its Question No. 3 to the jury, because the evidence was wholly insufficient to raise the issue there submitted. The fact that there was a soft place, if any there was, between the rails would not, in and of itself, raise the issue of negligence. The fact that the employee was killed did not raise that issue, and by this question the jury was permitted to determine for itself, without regard to law or fact, the responsibility for the accident in question. Reference is here made to the exception taken by the defendant to this question when the Court's charge was submitted to counsel.

VIII

The Court erred in submitting its Question No. 4 to the jury. The evidence did not indicate a proximate cause of the accident, and to propound this inquiry was misleading and thereby the jury was warranted in indulging in a speculation of its own. Reference is here made to the exception taken by the defendant to this question at the time the Court's charge was submitted to the counsel.

IX

The Court erred in submitting its Question No. 5 to the jury; same was entirely too restrictive, and thereunder a

finding against the defendant was authorized, even though the place complained of was obvious. He assumed the risk if he could have known of the character of this place by the use of ordinary care. It is perfectly apparent that the conditions at that place were obvious. Reference is made to the exception taken by the defendant to this question at the time the Court's charge was submitted to counsel.

X

[fol. 40] The verdict entered in this case, and the judgment entered thereon, are each and both wholly without evidence to sustain them. The evidence does not disclose how or why the accident in question happened, and it is only by building one surmise upon another that a conclusion can be reached, and conclusions may not be legally reached that was, particularly where, as here, the burden is on the plaintiff to show the cause of the accident, and that such cause was the result of the negligence of the defendant.

There was, under the evidence and all the evidence, no occasion to submit any issue to the jury. Deceased was last seen alive walking on running along the side of the string of cars. What his purpose was is not disclosed. He had no duty to perform on the cars,—none of the train crew expected him to undertake to board the cars while in motion in the switch, and unless it is to be now held that the mere fact that he was found dead on the track makes a cause of action, defendant was entitled to a judgment. And, as this cause of action arises under the Federal Employers' Liability Act, it was necessary before recovery is warranted that there be evidence sufficient to justify the conclusion that the accident was the result of defendant's negligence, and defendant is entitled to know from the evidence in what the negligence consisted that was the proximate cause of the accident.

The verdict of the jury, and the judgment of the Court entered thereon are, therefore, not only against the manifest weight and great preponderance of the evidence, but same have, in truth, no evidence sufficient to warrant recovery to sustain them.

XI

This cause arose under the Federal Employers' Liability Act, and thereunder the defense of assumed risk as applied [fol. 41] to a case of this character is a complete defense, and under the evidence the deceased assumed the risk of the dangers to be encountered at the time and place of this accident. No issue arises as to the negligence of the other employees engaged with the deceased at the time and place of accident. No negligence arises out of the operation of the train. Conditions surrounding deceased just previous to the accident were open and obvious. He was moving in his own discretion and not under direction, and under the rules applied in the construction of the Federal Employers' Liability Act the deceased assumed the risk of the dangers to be encountered in the performance of the acts he was doing at the time he was killed.

XII

The verdict of the jury is excessive. It appears that the maximum salary received by deceased during any one month was approximately $170.00. The Court judicially knows that from this his own living expenses should be deducted, and when all the elements are considered, the finding of the jury in the amount returned is out of proportion to the loss sustained by the beneficiaries.

Defendant asks that a new trial be granted to it herein.

(Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant, Atchison, Topeka & Santa Fe Ry. Co.

(Endorsed:) No. 29002. District Court of El Paso Co., Texas, 65th Judicial District. Mack Saxon, Ancillary Administrator and Personal Representative in Texas in the Estate of J. W. Moore, Deceased, Plaintiff, vs. Atchison, Topeka & Santa Fe Ry. Co., Defendant. Defendant's Amended Motion for a New Trial. Filed this 2 day of May A. D. 1929. C. W. Harper, Clerk District Court, El Paso Co., Texas.

[fol. 42] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT.

[Title omitted]

ORDER OVERRULING AMENDED MOTION FOR NEW TRIAL

On this, the 2nd day of May, 1929, came on to be heard the amended motion for a new trial as herein filed by the defendant, Atchison, Topeka & Santa Fe Railway Company, and the court, after considering same, is of opinion that said motion is not well taken and should be overruled.

It is, therefore, considered, ordered and adjudged by the Court that the said amended motion for a new trial as herein filed by said defendant, be, and the same is hereby refused and overruled; and to the action of the Court in failing to grant said motion, and in overruling the same, the said defendant, Atchison, Topeka & Santa Fe Railway Company then and there in open court duly excepted and gave notice of appeal to the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas.

It is further ordered that said defendant Atchison, Topeka & Santa Fe Railway Company be allowed, and it is here and now granted eighty (80) days from and after the adjournment of this term of court in which to prepare, have approved and file herein a statement of facts and bills of exception.

[fols. 43-46] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

NOTICE OF APPEAL—Filed May 2nd, 1929

Notice is hereby given that the amended motion for a new trial, as filed herein by the defendant, has been overruled, that the said defendant has given notice of and appealed from the judgment entered herein, as well as from the order of the Court overruling and failing to grant its amended motion for a new trial.

(Signed) Turney, Burges, Culwell & Pollard, Attorneys for Defendant, Atchison, Topeka & Santa Fe Ry. Co.

Bond on appeal for $40,000, approved and filed May 16, 1929, omitted in printing.

[fol. 47] Clerk's certificate omitted in printing.

[fol. 48] IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, SIXTY-FIFTH JUDICIAL DISTRICT

[Title omitted]

STATEMENT OF FACTS

Be it remembered that on the trial of the above styled and numbered cause, the following was all the oral and documentary evidence introduced:

JOHN L. MAYHALL, a witness for Plaintiff, being duly sworn, testified as follows:

My name is John L. Mayhall, and I live at Clovis, New Mexico. At present I am a switchman for the Santa Fe, the Atchison, Topeka & Santa Fe Railway Company. On February 15th, 1927, I was living at Clovis. I was braking at that time between Clovis and Vaughan. Tolar, New Mexico, is between those stations. I knew J. W. Moore very well. At that time he was braking on the same train that I was, he was on the head end. Mr. Moore was living in Clovis, and on the date mentioned, the 15th of February, 1927, he was braking on the same train that I was. On that day, the freight train we were braking on was westbound, going from Clovis to Vaughan. W. J. Smith was the conductor and C. A. Crista the engineer. A man named Delaney was fireman, I don't know his first name. There were two brakemen, I was what is called rear brakeman and J. W. Moore was head brakeman. As head brakeman, Mr. Moore rode mostly on the engine, the head end of the train; and as rear brakeman, [fol. 49] I rode in the caboose. This was a freight train, and, if I am not mistaken, there were 110 cars in the train. That would make the train pretty close to a mile long,—not quite, I don't know the exact measurement, but pretty close

to a mile in length. We reached Tolar in daytime, in the morning,—let's see, I think about 9:49 a. m., that is, the siding, that is when we stopped there. We came to a dead stop at Tolar. We stopped to head into the siding. I don't know just how far we stopped the train from the switch point that threw us into the siding. I was on the rear end, but I understand the engineer said about fifty steps. We were taking a siding to clear No. 22, eastbound passenger. No. 22 is an eastbound passenger train. We had time to clear the main line for No. 22 on time, but we have a ruling, you know, that we must clear them five minutes before their schedule leaving time. We did not have time to clear five minutes. The rule requires, if you can't that it be protected by a flag, by that I mean by a flagman with the necessary equipment. The flagman was to protect the train, stop the passenger train should we not get in the clear before its arrival. He was to flag the on-coming passenger train. We arrived at the switch in time to get in and make the clearance before the passenger train did leave. If it had been on time, we would have had sufficient time, but we still had that five minute rule. I believe the passenger train was a little late that day. The freight train didn't get into the siding a great deal ahead of the time it did actually get there. If it had been on time, the freight train would have gotten into the siding before the actual time was up, fifty-seven (9:57). You will have to check up on that time, I am not sure, I think it is fifty-seven. I am testifying from my recollection of the time we had, not from some memorandum some employee made. As well as I remember, the passenger [fol. 50] train was a little late. We just did get in on the siding in time to clear the main line for the passenger train as it did arrive. If the passenger train had been on time, we would have had time to clear that before its actual arrival, according to my recollection of the time, fifty-seven. There is only one time shown on the time table at that station, and that is fifty-seven (9:57). When only one is shown, it is the arriving and leaving time. I am referring to the time of the passenger train coming in. That freight train was run into this siding on what is known as short time in railroad language, it was pretty close time. By short time I mean that it was a pretty close margin to give time to clear that switch point for the passing passenger train. The last place we could have stopped that freight train and taken a

siding was at a station about five or six miles east that we call Krider. As to whether anything was said by the conductor about stopping his train at Krider for the siding,—I will say that we spoke of it in the caboose, as we were going into Krider, it was going to be pretty close, but Krider is a short passing track and wouldn't hold our train and we thought we had better go to Tolar, we thought we would have time to clear them with flag protection, you understand. Yes, we thought with flag protection we would have time, and it would save sawing the passenger train by. Krider is a short siding, I think a ninety car length passing track, and we had 110 cars. If we had met the passenger train there, we would have had to saw him by. By that I don't mean cutting the train, you flag the passenger and he pulls up between switches and you pull by him. The discussion between the conductor and me was that we thought we would have time, by the use of our flagman, to make Tolar, though we recognized it was short time. In order to prevent the trouble of sawing by, the conductor decided to go ahead, and so ran his train on to Tolar siding. When we got to Tolar siding and stopped our train, it was the head [fol. 51] brakeman's duty, Mr. Moore's, to throw the switch and let the train in on to the siding. Our train was traveling westward. It was Mr. Moore's business to open the switch between the siding and the main line and let the train in on the siding. I didn't see him do that, I couldn't have seen him from the rear. His business was at the front end, and he was there to do this work. After he put the train in on the siding, it would have been his duty to head out the other end when he got ready to go, at the west end of the siding. It would be Mr. Moore's business to throw the switch so as to put the freight train back on the main line. In the ordinary discharge of his work, he would have to be on the engine, I presume, to get to that switch point to open on to the main line, that is where I would be to head out. He would have to get back on the train and go toward the front and be there ready to let the train out on the main line. He also had a duty with reference to that passenger train that was coming, he had to protect our train against the passenger train. As to what he would have done, if he had done just what his duty called him to do,—well, he would have to be on the head end, be in a position to flag in case we broke in two or didn't get in the clear in time.

He would have to be toward the head, to be as far up the track as he could be when he flagged the passenger train. If he had done his work in the ordinary way that a brakeman should have discharged his work, he would have gotten on that train for two reasons, one for the purpose of throwing the switch to let the train on the main line, and the other for the purpose of being as far up the track as possible in order to flag against the passenger train. I understand he had an agreement with the crew whereby they would open the switch at the other end, but I don't know anything about that. In the ordinary discharge of his work, that would be his work, those two things. I never saw him at any time. The brakemen have a flag when they go to [fol. 52] flag, it is kept in a box on the engine. I didn't have one, I didn't have occasion to use it. The train was equipped so I could have one if I wanted one. I didn't see how Mr. Moore accomplished his work, whether he ran on the main line or tried to get on the freight train, I don't know except what I have heard. I went up to the scene of his death just as soon as we got in the clear. I saw his flag, it was by the side of his body. I picked it up myself. I took it back to the caboose when we left town. That is the flag he would have used in the discharge of his duty to flag the passenger train. His gloves and cap and flag were all close to his body. I had known Mr. Moore several years, he had been there about twelve years and I had been about ten. I had worked with him a great deal, I had worked with him, I think, that past year. He was an exceptionally careful man and obedient to the rules, he was an awfully good rule man. Mr. Moore was working on the north side of the train, between the passing track and the main line. The passing track is on the south side of the main line. He was on the north side of the passing track and on the south side of the main line. Between those tracks there is a place that has been put there for the use of brakemen in running up and down freight trains and making couplings and getting off and on cars, that is the work place. It is covered with screening and beaten down,—well, I don't know whether beaten down, it is packed. It is a well-worn and hard surface. No. 22 was a passenger train, and, of course, if that train had run into our train it would have been a wreck of two trains, and a great many people's lives would have been at stake. Mr. Moore was not present when the con-

ductor discussed the advisability of proceeding on to Tolar, he was on the engine. He didn't hear the conductor say "We will go on under our flag protection". Mr. Moore would know that they were going in on short time and what his duties required, a man of his experience would know, he was a promoted man, an extra conductor. The fact that [fol. 53] he had the flag would indicate that was what he was doing. As to the speed this train was making, at its fastest, going on that siding,—well, I imagine, at some portion passing into the passing track, it reached a speed of between fifteen and twenty, it started slow and stopped slow. I wouldn't say that was faster than the ordinary speed of trains taking those sidings. It made about that, I am not sure. When the engineer knows the brakeman is to get on the train to make a flag, in that case, it might be faster than is usual and ordinary. Yes, I expect it was a little faster at that time, taking into consideration the kind of work Mr. Moore was doing.

Cross-examination:

We left Clovis about 8:10 that morning. As to whether our train was No. 3811—I will say I am not sure about that engine number, it was second 33-K, I believe. We had 110 cars in that train. It wasn't a heavy train, figuring tonnage, it was mostly empties. We only had about twenty-eight or thirty loads, and they were all on the head end, too, they were all next to the engine. When we reached Tolar, I was riding in the caboose. Mr. Moore was on the engine, I presume. That is where he ought to have been. He knew we were going to take the siding there, and it was his duty to throw the switch so that our train could go in on the passing track. It is a fact that our train came to a dead stop just prior to the time that he opened that switch, he had to use the automatic to stop. I did not get out then, I never got out of the caboose. I knew they were taking the siding, too. The conductor was there with me. Then the train started up and went on into the passing track. It is a down grade going into that track. The engineer used steam going in there, and I saw him shut off. Of course, I couldn't tell where the engine was when he shut off, he was so far away, but I saw him when he shut off. [fol. 54] I couldn't tell you whether 110 cars is right

around 4,000 feet, we have always referred to it as a mile. There is a way to get at that. I guess some of them know exactly how long that train was. Of course, in starting into that passing track, they started very slow. I didn't pay a great deal of attention to the speed of that train in going in there, because I had no cause to think anything would happen. The whole crew knew we were going to stop on that siding and let that passenger train by. The first station west of Tolar is Taiban. It is four miles from Tolar, I think. It is around a curve to the south. That is open country. It is a fact that from Tolar you can see a train at Taiban plaintly. I don't know that those on the front end of this train saw where the passenger train was that was approaching, I know it is possible to, it is in plain sight. It was within the power and vision of the engineer, fireman, and whoever may have been on the front end, to have located exactly where that passenger train was when he started in on the switch. I didn't see Mr. Moore, but I knew he was the one whose duty it was to throw the switch to let us in on the passing track. It was also his duty, ordinarily, to open the switch so that we could get back on the main line. It is customary, I believe, for the head brakeman, in order to accomplish that purpose, to ride on the engine through the switch, some do and some don't. The main thing is to get out as soon as you can. If he was riding on the rear end of 110 cars, and he was the one who was to throw that switch, he would have to walk all that distance and hold the train there. So the head brakeman does ride the engine when he knows he is going to throw a switch. In the ordinary conduct of the business, after he had opened the switch so that we could get in on the passing track, he would usually get on the engine as it passed him. I wouldn't think he would wait for the caboose or wait for forty cars to come by, I wouldn't, I wouldn't want to walk back, and that is what he would have to do. After he [fol. 55] threw the switch, and before the train got momentum, as the engine came be, the usual and customary way a brakeman handles it is to get on the engine and ride down to the other switch. I only know what the engine men told me as to who was to open the other switch on the morning in question, that is all I know about that. I don't remember the number of the car on which blood was found,

when that train was inspected at Vaughan, but I believe it was thirty-four cars from the engine—thirty-three or thirty-four. It was a reefer, a refrigerator car. I wouldn't swear it was number 13476, but it probably was if it is on the record. I do know that the car on which they found blood was thirty-four cars back from the engine. I think that is the only one they found blood on, it was the first one, anyway. When a brakeman knows that he has got to throw a switch to get out on the main line and knows that that train can't move until he does throw the switch, it isn't usual and customary for him to wait for thirty-three cars to pass before he undertakes to ride down to the switch, but under this particular case he wanted to look those loads over, I am satisfied that is what his idea was. I have no information about that, I don't know what he was doing. So far as throwing the switch is concerned, it is usual and customary that a man will get on the engine to ride down to the switch. Of course, I don't know what he was trying to do at the time he got killed, I don't know what caused the accident. It was pretty windy that morning and dusty. The wind was blowing out of the southwest, I believe. There was smoke coming from the engine and it was laying down low. When the engineer shut off, you saw that smoke hit right on top of the train and the wind stuck it right around to the north of the train. I don't know how long it was from the time I noticed that he shut off until he brought the train to a standstill, it wasn't a great while. I didn't pay any attention to what [fol. 56] the time was consumed between the time he shut off and the time he got in the clear. This passenger train was due at 9:57 and we reached the switch at 9:48 or 9:49, somewhere along there. That gave us the difference between that time and the time the other train was due to get in there. Well, yes, that is as much time as you often take to go into a sidetrack, sometimes you take more and sometimes less, it all depends on whether the engineer gets the air from under him, the automatic air out, the brakes released. Sometimes they have trouble. There was nothing unusual in that engineer going in there with that time in front of him, it was all right. The only thing that is necessary was to get in there in time for the passenger train to get by, provided you are protected by a flag. Yes, we did

get in in time. I presume our train was standing perfectly still when the passenger train reached the head switch—I don't know about whether they were at a standstill on the head end when the train went by, I know we were on the rear end before he came up with us. I know we were standing dead still when the passenger train got to the station and stopped. That train was flagged there that morning, I flagged him myself, for the purpose of picking up this body. I stated that the walkway along the side of the track was a hard walkway. I am familiar with the tracks and walkways along there. I have been familiar with them for years, ever since I worked there. I presume Mr. Moore was familiar with that walkway, he had been there a long time. He had been running over that particular track something in the neighborhood of ten or twelve years. I don't know whether that is exactly right or not, he had been on the other end at times. I didn't notice any material difference in the character of the walkway on the morning in question to what it had been previously. This photograph (Ex. "B") seems to be a correct representation of the tracks, station, walkway, and so on, at Tolar at the time of this accident. This is facing east, that is the [fol. 57] west end and this east. This photograph (Ex. "A") is a representation of the same place, and, as far as I know, it existed in that condition at the time of this accident. This other photograph (Ex. "C"), just showing the tracks, looks like it to me.

Whereupon, the photographs above referred to were offered in evidence by defendant, copies of which are attached hereto, marked Exhibits "A", "B", and "C", respectively.

As you look at this photograph (Ex. "A"), the station building appears to be on the right-hand side of the main line. The first track next to the station is the main line and the next track to that is what is called the passing track, that is the track we were going in on that morning. In looking at this picture, we were going this way, going toward the station, as you see the picture. In other words, we were taking this sidetrack to the extreme left. This point along here (indicating) correctly represents the walkway that the brakemen would use. When we found Mr.

Moore he was in between these two tracks. This other picture (Ex. "B") represents it from the other direction. Looking at this you would be going in the opposite direction, that would be the passing track and this the main line. The walkway between was the same one used and that appears in the other picture. Mr. Moore's body was found close to this house track switch, the switch that appears in the extreme left of Exhibit "B". So far as I know, this correctly represents the whole surroundings on the morning of the accident. This picture (Ex. "C") is the passing track, you can see from the ties. I notice on one of the ties there is a chunk of coal or a rock on the end of the tie. I don't know what that was put there for, unless it just dropped there. I don't know whether that represents the point where Mr. Moore was found or not. In going out to throw a switch, a brakeman does not usually take his flag along with him unless he is going against a [fol. 58] train he thinks he will probably have to flag. If he knows he is throwing a switch that represents a meeting point between two trains, he would take his flag if the time is close. I didn't see the accident. I don't know of any conversation between the engine crew and the head brakeman only what they told me. I believe the sun was shining that morning, but there was so much dust in the air it wasn't an exceptionally bright day. I couldn't say whether it was cloudy, it wasn't a dark day. We weren't in that passing track but a short time when the passenger train showed up, just long enough for me to leave the caboose and walk up there a bit past the body and flag No. 22, they were coming up the straight track. As I have said, one on the engine of a freight train, looking towards Taiban, could see a train at Taiban and all the way down. That is equally true of one on the engine approaching Tolar from Taiban, from the engineer's side you can see a train at Tolar, too.

Redirect examination:

I have said that the head brakeman, in throwing a switch to let the train in on the sidetrack, when he was going to let them out at the other end would ordinarily catch the engine or front end of the train if he didn't want to look over the loads, you know loads will run hot where empties

won't. By looking them over, I mean inspecting for hot boxes and brakes sticking. In Mr. Moore's case, unless he had some of those cars he wanted to look over, ordinarily he would have taken the engine or some of the front cars toward the head end, to be as far up as possible. If he did look over any, the next thing was to get on the train and go up. I stated to Mr. Culwell that we reached this place at 9:49. That is what the conductor's record shows. I remember that at the time we said it was 9:49, because Mr. Smith was awfully careful to know we got in the clear for the passenger. I am going by my recollection and what the conductor entered, too. He enters it immediately after. I [fol. 59] don't know whether it was not entered until after Mr. Moore was killed, he might have put the arriving time down. Ordinarily, he wouldn't have had time under those circumstances. He put it down after the accident had happened. This was a dusty and windy day and sand was blowing. You couldn't see as well on a day like that as a clear day. A man who is down between the passing track and the main line, undertaking to get on the train to go to the front part, either for the purpose of flagging or for the purpose of getting up, couldn't see as far ahead as people on the engine, the higher you are the farther you can see. Mr. Moore couldn't see the train at Taiban.

C. E. Mahon, a witness for plaintiff, being duly sworn, testified as follows:

My name is C. E. Mahon and I live at Tolar, New Mexico. I have lived there since in April, 1901. I am a sand and gravel contractor. On the 15th day of February, 1927, I was loading some gravel at Tolar, New Mexico, for the Telephone Company over at Portales, New Mexico. I was loading it into one of those red coal cars, a railroad coal car. I remember the occasion of J. W. Moore being killed there at Tolar. At the time he was killed, I was coming up the highway there with a load of gravel. I seen the freight train as it was pulling into the siding and I seen Mr. Moore. At that time I was on the highway coming in with that load of gravel. I was going east and the train was going west. When I first saw Mr. Moore, he was running along by the

side of the train and he just reached up like he was going to catch on, but he didn't raise himself off of the ground, the best I could see he didn't catch it. He caught at it but didn't catch it. When I saw him first make the motion as though he was getting on the train, it looked like it was [fol. 60] something like about three car lengths behind the engine. After that he ran on west, the same way the train was going. When I first saw him make that motion with his hands, he was right west of the east end of the switch there, just west of the crossing (Referring to Ex. "A"). This is a crossing, and the first time I seen him, he was right in just west of this crossing. After making this first motion while he was running along by the side of the train about the third car, he continued to run along with the train. The train was outrunning him. Then I seen him make another attempt, that is, reach like he was going to catch again. That was the same kind of reaching as before, but I never did see him raise himself off of the ground. He made the same kind of motion toward the car as before. Then he was out of my sight. He was running the last time I saw him and went out of my sight. I never seen him any more after he went out of my sight until he was killed. I know approximately where the place is my son pointed out to me where he saw a footprint in a soft place, I know about where it is. I know where Mr. Moore was killed, I went there after he was killed. I saw the place where he was killed under the train and know where that place is. Where my son said this hole was, the last time I seen Mr. Moore, he was east of this hole, but he was killed west of where this hole was. I suppose he passed over that place after he went out of my sight and before he was killed, he was west of this hole when he was killed and he was east of it when I saw him go out of my sight. Oh, it must have been something like maybe fifty or sixty feet, in my best judgment, from the place he went out of my sight to the place he was killed. It must have been something like eight or ten feet, possibly twelve, not so very far, from the place he was killed back to the place where this footprint was. I saw those trains take the siding practically every day—that is, frequently, anyway. I do a good deal of work there. I [fol. 61] thought this freight train was running just a little bit faster than common in taking that siding. I saw the

passenger train west of there, about a mile west, and this freight train was coming in from the east. Mr. Moore was just a little west of the depot when I heard this passenger train, and I could see it just about a mile away, about a mile west. Well, I don't know how much of the freight train was on the siding at that time, to be exact. You see it is an every day occurrence there. The engine was quite a ways on ahead of Mr. Moore, and he was just west of the depot there, when I first saw the passenger train. To the best of my recollection, all of the train wasn't in on the siding when I heard this passenger whistle west. There was nothing unusual about the movement of the train only it just seemed like it was trying to get in in plenty of time, trying to pick up speed enough to get in and not detain this passenger. What indicated that to me was that it was kind of jerking occasionally. Mr. Traylor was the Company agent there at that time. I saw him there. He was in the depot, but, from what I understand, he seen the accident. He was there. The body of Mr. Moore was moved before I ever went around there. I suppose they put it on the passenger train, it was gone when I went around there.

Cross-examination:

I am familiar with this picture (Ex. "A"). This is looking west. This freight train was going west. I never paid any attention to the freight train before it taken the siding. When I first noticed it, the engine was right along here (indicating), it was just west of the crossing, this is looking west. It must have been something like fifty feet, or something near that, west of the crossing. At that particular time I was coming right up the highway, there is a highway coming east. That is a stack of grain doors that show in this picture to the west of the crossing sign. You see this highway is graded there, and this land is all lower [fol. 62] this way. The grain doors are here, and I was loading a car of gravel there, that is a picture of my wagon there. At the time I first saw the engine, I was coming up this highway, kind of north and west of those grain doors. I never measured the distance that highway is from the railroad tracks, but it must be four or maybe five hundred feet. The last time I seen Mr. Moore, he was just west of

this depot here, and I was coming up this highway. Right in there that is a coal bin that belongs to Mr. Watkins, and that coal bin obstructed my view west of the depot. Mr. Moore was in my sight from right along in here to just west of the depot there, a little west. I couldn't say how far it is from that crossing to the depot. It might be something like four hundred feet. As I said, I was on the highway and I turned and come in just between the grain doors and that there coal bin. You see, those grain doors are something like, I expect, 200, or maybe 250 feet from that coal bin. I came in between the two, between the bin and the grain doors. At a certain point down there the station itself would obstruct my view of Mr. Moore, he passed out of my sight while he was going by the depot here. You see those cars are setting just north of the depot on that house track, and I seen him when he was going along here and I seen him after he passed here. When I first saw Mr. Moore he was something like fifty feet west of this crossing, going down here, and I guess it is something like four hundred feet from the crossing to the depot. I could see him until he got just behind these here cars, and as soon as he passed the depot and the cars I could see him again. I was loading a car of gravel the day of the accident and there were two coal cars standing on that track. It is called a house track. I could see Mr. Moore, you see, from here (indicating fifty feet west of crossing) until just before he got to the depot, those cars extended a little east of the depot, and after he [fol. 63] passed west of the depot I could see him a little ways until the coal bin obstructed the view. Then I didn't see him any more until after the accident. The wind was blowing that day, and the smoke was kind of rolling over and settling down by the side of the train right smart. I didn't pay any particular attention to this train, I see freight trains coming in there every day, that was a common thing. There was no occasion for me to take any particular note of this train only I just noticed it was kind of in a hurry like coming in there, heading in, you see. You can't see four or five miles down that track from Tolar and you can't see the station of Taiban from Tolar. You cannot see a train standing at the station at Taiban and all the way into Tolar. You can see a train approaching Tolar

about a mile out of Tolar, and that is all. I am sure of that. There was nothing particularly unusual to see a brakeman run alongside of a moving freight train at that station. Some catches on at the front end and goes down, and sometimes they wait and catch on further back, you see. There was nothing unusual in anything I saw along there no more than only I just noticed him running pretty lively and the train kind of hurrying in. I suppose that freight train did get into the siding—yes, I know it did, they didn't have any collision there. You see Mr. Traylot held this board that stopped the passenger train that he said taken the corpse in. He flagged that train down to take the remains of this dead brakeman. I don't think the freight train was absolutely in the clear before the passenger train got to Tolar, I heard the passenger whistle when the engine was just west of the depot there a little ways, going in. That is four hundred feet—the engine, I guess, was about four hundred feet when I heard the passenger whistle. I judge that passenger train was about a mile away when it whistled, you could see it about a mile west. Mr. Pearce was asking me about where the boy said the hole was where Mr. Moore stepped in, I didn't see the hole, I didn't see any of that. I [fol. 64] am familiar with the railroad tracks along there. I don't have much occasion to go over between the passing track and the main line, I work on this house track, that is, I do my loading on this house track. This picture (Ex. "A") is a correct representation of the ground in between the passing track and the main line. I went out to the place where this brakeman was found on the ground after his body had been moved, I didn't see him on the ground at all. I don't know just exactly where on the ground his remains were picked up. I went out there and helped pick up some of the bones left, I walked down this sidetrack the freight was on, I walked in between the rails. The last time I saw brakeman Moore, he was running west by the side of the train and the train was going west.

Redirect examination:

I stated that it was about fifty feet, something like that, from the place Mr. Moore went out of my sight to the place he was killed. I arrived at my opinion as to the place he was killed by the blood I saw on the rail, it was

all on the inside of the rail, there was blood all along the rail there. I didn't see him when he got killed, but I saw the place where the blood was on the track, and that is what I was speaking of with reference to the distances a while ago.

LEONARD MAHON, a witness for plaintiff, being duly sworn, testified as follows:

My name is Leonard Mahon and the gentleman who just went out of the door is my father. I live at Tolar, New Mexico. I am fourteen years old. I was living at Tolar when Mr. Moore was killed. I remember the occasion of his being killed there, I was going to school at that time. I didn't see this accident when it happened, I were at school at the time, but I went down to the place [fol. 65] that day. I went there because I heard about it and I just wanted to go down and see. First, I went with Irvin Smith, and later, after noon, I went with the school children. I saw the signs on the track down there where the blood was, where Mr. Moore was supposed to have been killed. It was probably two hours after the accident when I first went down there. I saw a soft place in the pathway over which the brakemen run, it was three feet wide, probably, and four or five feet long, and it was along the siding track, it was just east of the west house track switch. It was a hole filled in with cinders or soft substance, and hadn't been packed down. I saw a footprint in that hole, it was pointed west, it was the left foot. I saw a footprint of the left foot, going west. What first attracted my attention to this soft place was that I stepped in it myself, and that called my attention to it. There was just one footprint. The footprint that I saw in there was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest. That hole or soft place was six or eight feet, maybe ten feet, east of the place where Mr. Moore was killed. I know Mr. Saulsbury, and when he was there recently, I took him down there to this place to show him where I saw this footprint, but it was hard then and had packed down and you couldn't tell. I pointed out the place it was, right

near it, anyway. My father was present, also. I pointed out the place where I saw the footprint I am speaking of.

Cross-examination:

I recognize this picture (Ex. "A") as being the station at Tolar. That looks like it, taken from the east side, and you are looking west, the same way this train is supposed to have been going. The place that I call a soft place was in between the main line track and this passing track. It was the other side of the depot, on the west side of the depot. This other picture (Ex. "B") is a pic-
[fol. 66] ture looking from the other direction. The soft place was near here, right along in there (pointing out on picture). It extended out about three feet from the track, the passing track, and was four or five feet long. It was small rock screenings. This looks about like the ground in between those two tracks. This picture is about a correct representation of what was there. I saw some blood on the rail, and that was on further west than the place where the screenings were, some six, eight or ten feet. I saw a footprint, but I don't know who it was that had stepped in there. I was down there about two hours after the accident, it was not three hours. I was down there just after twelve o'clock. I don't know that there were other people walking up and down there between the time of the accident and the time I got down, they said there were. Mr. Traylor and my father were, but I don't know, I wasn't there. I don't know how many people walked up and down between the time of the accident and the time I got down there.

Redirect examination:

The Smith boy's name is Irvin. The place where it was soft looked like the other.

Irvin Smith, a witness for plaintiff, being duly sworn, testified as follows:

My name is Irvin Smith. I know Leonard Mahon, who just testified and went out of the door. I remember the time that Mr. Moore, a brakeman, was killed there at

Tolar. I live at Tolar. At that time I was going to school at Taiban, but I wasn't at school that day. I went down to the place where this accident happened with Leonard Mahon and I saw the blood signs of where Mr. Moore was killed on the passing truck. There was a soft place probably eight or ten feet before where he was killed—[fol. 67] eight or ten east of where he was killed. My attention was first called to that place when Leonard stepped one foot in it, and called my attention to it. After Leonard called my attention to it, I saw one noticeable footprint in the hole. The footprint was going west. I stepped in the soft place myself. Compared to the footprint that I made and the one Leonard made, the footprint in there was a heavier one. It was a man's footprint. The front part was the deepest. It was the left foot.

Cross-examination:

That soft spot was about three feet wide and four feet long—four or five. It was out there in between the tracks. I am familiar with the tracks along there. The place was along there in this picture (Ex "B"), it doesn't show it very plain. The picture shows the depot at Tolar and it shows the passing track here and the main line, and all that. I recognize this picture (Ex. "A"), that track is running west. That shows the view east of the depot and the other shows west of the depot, on the other side.

Redirect examination:

As to whether there is a pathway along by the side of that passing track, which the brakemen have beaten out in going up and down that track, or whether it is alike all the way across—I will say that there is not much difference, that I noticed.

R. O. Robinson, a witness for plaintiff, being duly sworn, testified as follows:

My name is R. O. Robinson and I live at Clovis, New Mexico. I am a photographer. About the 19th day of February, 1927, I was called on by the representatives of the Railway

Company to take some photographs at Tolar. Mr. Miller here is the gentleman that carried me out. He is claim agent for the Railway Company and he lives at Clovis. I [fol. 68] didn't know Mr. Moore. I am not sure how many photographs I took, it was either three or four, I think. These are the pictures I took (Exs. "A", "B" and "C") and turned over to the Railway Company. They correctly represent the situation there. I had pointed out to me the place where the blood is still showing where Mr. Moore was killed. I saw that place, the blood is still showing. I also saw a hole or depression in the pathway there, used by brakemen, close to that pl-ce. I had that pointed out to me by the agent, Mr. Traylor. It wasn't exactly a hole, it was just a little bit lower place than the surrounding ground, not very much lower, but a little lower. It was possibly some six or eight feet long, I judge—I might not be correct, but something near that, and possibly three feet wide. It was just a little bit lower than the other ground surrounding it, the same color ground and everything, but just a little bit lower and softer than the surrounding ground. I stepped in it to see how much it would give. As to whether or not it did give sufficiently to cause a man to lose his balance who was running,—I will say that, in my opinion, it might cause a man to stumble who was running and it might not, depending upon circumstances, in my opinion, whether a man knew it was there or didn't know it was there or was looking where he was stepping. If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment. That hole was right in the pathway. There was a pathway there, it was well beaten. It was the same color, but you could tell it was worn out. That pathway was close to the track.

Cross-examination:

These photographs correctly represent the ground there. I took them correctly and they show the thing just exactly as it was. At this particular point the ground was just a little lower and the path was across it. There was a path [fol. 69] all the way along the track. Of course, this path wasn't as plain along this place particularly as on each side, but at the same time it was there. There was nothing rough about it. I judge the passageway along there was about as smooth as they usually are between railroad tracks.

Mrs. J. W. Moore, a witness for plaintiff, being duly sworn, testified as follows:

I am Mrs. J. W. Moore. Mr. Moore was past thirty-eight years old when he was killed. Mr. Moore and I had two children, the oldest was James Quentin, who was five years old at the time, and the next was Mary Louise, who was three years old at the time. Those children are both with me. Mr. Moore did not have any other children. He was never married before and neither was I. Mr. Moore had been in the railway service about twelve years. We were living in Clovis, New Mexico, at the time he was killed. He was a brakeman and also a conductor, a promoted brakeman, is the way they express it. I know how much money he was making on an average. He was making between—right around $200.00 and $225.00 a month. He would average that. He spent all of that money on himself and his family, that is, his wife and his two children. He was a man who spent his spare time, when not working, at home. He took a great deal of interest in his children and spent most of the time he was at home with them.

Cross-examination:

Mr. Moore had been running over the track between Clovis and Vaughan for a long time and was familiar with it all. I said that Mr. Moore's average earnings were between $200.00 and $225.00. I hardly think I am mistaken about that. He was paid by check, railroad pay check. I know his handwriting and this is his handwriting on these checks you [fol. 70] have handed me. This shows that for the month of February, 1926, his salary was $149.96. Some months he fell lower and maybe the next it would be more. The two checks for March are $174.96, and for April $166.62. For May it is $174.96, for June 166.60, for July $166.62, for August $174.96, for September $166.62, for October $174.00, for November $166.62, and for December $166.62. He was paid twice a month, there are two pay checks to cover one month. For January, 1927, it was $174.96. He was killed the 15th of February. For the first half of February it shows it was $80.06, that is his name on the back. There was no month he made as much as $175.00. We lived in Clovis. He used his salary to support the family. He was on the road a good deal. He had a regular run.

Redirect examination:

He had been promoted to be a conductor, and later on, when he got a regular run as conductor, his wages would increase.

It is agreed that Mrs. Bertha Moore is the duly appointed, qualified and acting administratrix of the estate of J. W. Moore, deceased, having been appointed such by the Probate Court of the County of Curry, State of New Mexico, and that on the 23rd day of January, 1928, the said Mrs. Bertha Moore, as said administratrix, for the benefit of herself and of Mary Louise Moore and James Quentin Moore, minor children of herself and the said J. W. Moore, deceased, filed suit in the District Court of El Paso County, Texas, and in the 65th Judicial District against the Atchison, Topeka and Santa Fe Railway Company, to recover damages by reason of the death of the said J. W. Moore, deceased. It is further agreed that Mack Saxon is the duly appointed, qualified and acting ancillary administrator and personal representative of the estate of J. W. Moore, deceased, having been appointed such by the Probate Court of El Paso [fol. 71] County, Texas, and that by order of the District Court of the 65th Judicial District of the State of Texas, the said Mack Saxon, as said Ancillary Administrator, was permitted to intervene in said above cause, and was permitted to prosecute said cause for the use and benefit of the above described parties in said District Court of the 65th Judicial District of Texas to judgment.

It is agreed that the freight train on which brakeman Moore was employed at the time of the accident was handling interstate commerce; that there were cars of freight in that train that had originated at points outside of the State of New Mexico and were destined to points beyond the State of New Mexico; and it is agreed that the cause of action, if any, arises under the said Federal Employers' Liability Act.

Plaintiff rests.

H. C. DELANEY, a witness for defendant, being duly sworn, testified as follows:

My name is H. C. Delaney. In February, of 1927, I was a fireman in the service of the Santa Fe. I was in the "chain gang" service, the freight service, between Clovis and Vaughan. I knew brakeman Moore. He was killed at Tolar on the 15th day of February, 1927. He was head brakeman. That freight train was westbound. When we got to Tolar, we were intending to head in for No. 22. When I say head in, I mean take the sidetrack. I was riding on the fireman's side of the engine. It was necessary to throw the switch so we could go in on the sidetrack. When we got to the switch, our train came to a dead stop at that switch. Brakeman Moore threw the switch, then we released the brakes, the train brakes, and pulled in the passing track. We had 110 cars in that train. I don't know [fol. 72] how many loads we had, about twenty-eight or nine loads, I think. I am not sure about the loads. As to whether that was a heavy, light or medium train for our engine—I will say it was just an ordinary freight train. In starting in on that passing track, the train wasn't started fast, it was just started slow. We stopped back from the switch a short ways, worked steam until the engine was in the passing track down to about the depot, and shut the engine off. We had one engine. The track along there is down grade in the direction we were going. After we started the train up as we were going into the passing track, brakeman Moore stepped over between the passing track and the main line, the last time I seen him. After the engine started and got down closer to the switch, I couldn't see him, he was on the opposite side from me. He lined the switch and walked over between the passing track and the main line, and that put him on the engineer's side and I couldn't see him. I knew that we were taking a siding for a passenger train to pass. We reached Tolar at 9:48 a. m., I am sure of that. The passenger train was due at Tolar at 9:57 that gave us nine minutes in which to get in the clear. In going into the passing track, of course, we started slow and the speed increased, I judge, up to ten or twelve miles an hour, and I don't think it exceeded that at any time. I did not notice any jerking of the cars. In going in there, the engineer worked steam until he got the train to rolling and then shut the engine off and let the train drift in. He shut the engine off entirely and we just drifted in. He

never worked any steam after he shut the engine off, he let the train drift until it got up to the speed he thought it would drift in and go in, and then be began to slow the engine down with the independent, that is the engine brakes. He didn't apply the emergency, he didn't use the automatic air after the heading in point, when he first stopped. He didn't use it any more at all. I didn't see [fol. 73] the accident. Brakeman Moore was riding the engine at the time we stopped to go in on the passing track. I had an understanding with him as to what I was to do. He was to get off and line the switch for the passing track, and if anything should happen, he would flag No. 22; we would pull on in to the passing track, and if he didn't come over the head end, didn't get up at the time No. 22 cleared, I was to line the switch at the west end, going out on the main line, after No. 22 cleared. I was going to line the switch for him. I don't know of any occasion for him to try to get on that train at all, in view of the conversation I had with him there. I wasn't expecting him to get on the train. That conversation was in the presence of the engineer, it was on the engine, but I doubt very much if he could hear, Mr. Moore was on my side. I was not expecting brakeman Moore to try to get on that train at all. It was my purpose to line the switch in order to get back on the main line. It is the duty of the head brakeman to open switches for the engine. It is usual and customary, where the head brakeman expects to line the switch, for him to ride on the engine for that purpose, or catch a few cars back, they sometimes do that, but they ride the head end of the train. That is the usual and customary way of doing it. I was not expecting him to line this switch at all. He was going to flag No. 22 in case anything happened, if it didn't, he was going to let the train pull by, inspect the train as we pulled in, and come to the head end, he said if he didn't, he would come at Taiban. Taiban is the first station west of Tolar, I judge it is about four miles from Tolar. On the engine you can see a train approaching from Taiban, you can see them almost all the way to Taiban. There is a curve where you can't see, but you can tell by the smoke about where the train was all the time. I saw this passenger train, I saw it when he was leaving Taiban. We had time to get in the clear with our train, we didn't

[fol. 74] have quite time to clear the five minutes which we are required to clear a first class train unless we flag, protect our train according to rule. We did have actually time enough, we had a flag ready to flag in case anything did happen. With a long train, a hundred and ten cars, something might happen to the air or we might break in two, we do occasionally—very often. Brakeman Moore, as he stood out there, would naturally see that our train remained intact going through that sidetrack. As he inspected the train, he would know if anything happened to the train. I am familiar with the track along there. I didn't see the place where the accident was, I didn't get off the engine. We didn't know anything about the accident until something like forty or fifty minutes after it happened. Our train was absolutely in the clear before the passenger train reached there. The passenger train was a time card train. We were going against that train on the time card there, I knew what time that train was due at Tolar. We reached Tolar nine minutes before that train was due at that station.

Cross-examination:

I had known Mr. Moore something over a year and had worked with him quite a bit. He was a very careful man and very obedient to the rules. I think he was exceptionally so. We stopped between thirty-five and fifty steps before we got to the switch—I don't believe it was over fifty steps, somewhere around fifty. Mr. Moore was on the engine and he got off of the engine and went up to throw the switch. He walked from the engine up to throw the switch. When we got to that point we had nine minutes. The schedule arrival of the train was 9:57. The passenger train might have been a few minutes late, I couldn't say, I never noticed. I think it did arrive a little late at Tolar. We had cleared his arriving time at Tolar. We cleared it a 9:57, [fol. 75] we cleared his time. I noticed when we cleared it. I made a record of it when we stopped in the clear at the west end, after Mr. Moore was killed. I looked at my watch when we stopped at the west switch and saw we had cleared it. We cleared his time about two or three minutes, not when it actually arrived but the schedule time. We cleared his time about two minutes, I don't know what time he arrived at Tolar. We cleared the due

time of the train two minutes. I don't know how many minutes late he was. He was about two minutes late out of Taiban. I know that because I could see when he left. I looked at my watch and saw how late he was leaving. I don't know how late he was when he got to Tolar, I was working with my fire when he come by. I think he arrived there late but I don't know how much. In addition to the two minutes, we cleared him the additional time he was late. As to my having made this record, that shows this, after Mr. Moore was killed—I will say that I just looked at my watch when we stopped in the clear, I didn't know anything about Mr. Moore being killed. Yes, I made my record after Mr. Moore was killed, because he was killed as we were pulling in. I don't know as it was 150 feet from the switch that we stopped, I don't think we stopped 50 steps. Whatever it was, Mr. Moore walked up and threw the switch. We didn't kill any time there, we pulled right in. We released the brakes as soon as the engineer stopped the train, he put the valve in full release. I don't remember whether he stopped the train before Mr. Moore got to the switch. We started the train as soon as the brakes were released. We started slow, no slower than ordinary, just the ordinary condition. I don't think at any time we reached a speed of more than ten or twelve miles an hour, there was no occasion to cause us to pay any particular attention to the speed. We started out slow, and were making no effort to make speed, and finally got up to what I think was ten or twelve miles an [fol. 76] hour. After we got that up, we shut the steam off and slowed down again and eased on until we stopped, let the train drift on in. Our average speed, from the time we started back there to the time we stopped, was over four miles an hour. We weren't making ten miles an hour when he shut the engine off, the train gained speed until he began to slow it down. I don't know just what our average speed would be through there, it would probably be a little more than four or five miles an hour. I imagine the average speed would be about eight miles an hour. If our train stopped back 150 feet from the switch point, I don't think it was at least a mile up to the place we stopped. A hundred and ten cars would be about between 4,000 and 4,200 feet. I don't know just what the length of the engine was, but between 90 and 100 feet for the engine and tank together. That would be about 4,600 feet, close to a mile. If you were going

five miles an hour, it would take you twelve minutes to go a mile. We stopped at the switch point at 9:48, I looked at my watch when we stopped. I think that was the first stop we had made after we left Clovis. When twenty-two cleared, I lined the switch and we pulled on out, and they stopped us on the main line, the conductor pulled the air and we broke in two. The next place we stopped, after we left Tolar, was at Taiban. I don't remember the time, I didn't look at my watch there, we had to take coal and water and clean the fire. The next stop after Taiban was when we met a fellow at Aguda. I looked at my watch and we stopped there about 12:30. I didn't say that it was about 9:48 when we stopped at the switch point, but this other was about 12:30. Tolar is one place we stopped where I know what time it was, and we were meeting a fellow at Aguda, we were there about 12:30, I am not going to change that. I don't know the exact time of any other stop except the Tolar stop. We talked about taking the siding at the station before you get to Tolar. No, we didn't talk about our time being a little short to make Tolar, but Tolar is a bad place to head in, most engineers [fol. 77] hate to head in there. I talked with the engineer. Mr. Moore wanted to know why we didn't go to Tolar, he said we had plenty of time. After he insisted, we went, we did have time. I did say the engineers hated to head in there but they do head in. Krider is the name of the station before Tolar. As to whether or not we discussed stopping at Krider, and the reason for not wanting to stop was that we would have to saw the train, and we decided we would have time to go on provided Mr. Moore would flag the passenger—I will say that I don't remember about the passenger train. I believe that was discussed, but I am not sure. That was not the understanding, that we couldn't go to Tolar, he said all the time we had time to go to Tolar, we would have plenty of time if nothing happened, you always take these into consideration. The rule required us to be there and clear it five minutes. We thought we had time enough to do that. We always have that privilege of flagging a train, any time we can't clear a train under schedule, we can flag and protect our train. We didn't clear it five minutes, we cleared it two. Under the rules of the company, where we were not clearing it five minutes, we are required to put a man out to flag the train. That is what Mr. Moore was doing, he got off the train, and him not coming over, it would

be my duty to flag, being on the head end. To flag, Mr. Moore should have been as far up the main line as possible, as far toward the head end. A fireman is required to flag if the brakeman can't. It was Mr. Moore's duty to be as far up the track as possible. In order to be as far up as possible, he had to be on the train. That is what he should do, get on the train and ride it as far up in order to flag in accordance with the rules, that is according to the rules. The conductor gave us the high sign at Krider—the highball. Mr. Moore didn't have any right to give us the highball. This authority came from the conductor, this matter between [fol. 78] Mr. Moore and me was just talk. The authority came from the conductor when he gave us the highball. You don't have to go on the highball if you don't think you have time. We went on and we did have time. As to not clearing within the rules—well, we knew it would be close, you don't know how many minutes it will take with a heavy train. We knew it would be close and we were taking chances.

Redirect examination:

He was asking me about the time I looked at my watch and if it wasn't after Mr. Moore was killed—I didn't know at that time that Mr. Moore had been killed, I didn't know anything about it. The reason I was looking at my watch was because we were meeting a first class train there. That was the only first class train we met that day, that is the reason I know about the time at Tolar, because we were meeting a first class train there. In going in on that passing track, there was no difference in going in there that day, the speed and so on, and what we usually did. It was all the same every day railroading. The fact is we did get in the clear and we didn't hold up the passenger train, there was no occasion for us to flag on the head end at all. We were not expecting Mr. Moore to get on our freight train in that passing track.

Recross-examination:

At the time we started in on the passing track, we didn't think we would have time to clear it within the rules. As to whether we hurried—I will say there is times when hurrying is about the worst thing you can do with a freight

train with 110 cars in a 110 car passing track, you don't have much space. We try to get in as quick as possible.

[fol. 79] C. A. CRISTA, a witness for defendant, being duly sworn, testified as follows:

My name is C. A. Crista and I am an engineer in the service of the Santa Fe. I have been an engineer since June 15th, 1914. I was the engineer on that freight train, at the time brakeman Moore was killed at Tolar, running between Clovis and Vaughan. We were going west. I had the time card. I knew that No. 22 passenger train was running in the opposite direction to us and I knew what time it was due at Tolar. It was due at 9:47 a. m.—I mean 9:57, pardon me. That was the schedule time, 9:57 a. m. It was my duty to take the siding there for it. My train arrived at the switch at Tolar at approximately 9:46, probably it might have been 9:48. It was not later than 9:48. Mr. Moore was head brakeman. It was his duty to throw the switch there for us so we could go in. He did that. I had 110 cars on the train, and, after he threw that switch, I started the train as usual, working light throttle until slack was all adjusted, until I had passed over switch points in going in passing track, going about five or six miles an hour, approximately, when I headed into switch track. After getting engine over switch points and into switch track, I eased the throttle open wider, relying on momentum of train to get at speed of approximately twelve miles an hour. After getting speed of train to twelve miles an hour, I closed throttle and allowed train to drift in passing track, commencing about half way through passing track to ease train up with the independent brake valve, and gradually eased speed of train down, until I came to a stop at west end of Tolar passing track. I didn't use my emergency air at all going in there. Approximately twelve miles an hour was the maximum speed limit in going into that sidetrack. There is nothing unusual at all about that, that is the usual way freight trains are handled into that passing track. The next station we were to come to was Taiban. It is [fol. 80] approximately five miles from Tolar, maybe a little less. I saw the passenger train coming. The fireman

informed me that No. 22 was standing at the station at Taiban just about the time we started going into the passing track at Tolar. When I am on my engine at Tolar, I can see a train at Taiban, and I can see it all the way in. This approaching train was in the fireman's view all the way from Taiban to Tolar, and he informed me where it was, as the station of Taiban was in view of the left side of the locomotive, headed west, and the fireman informed me all along about the location of No. 22. It was the purpose of my train, as soon as the passenger train passed, to have the switch lined and get back on the main line. Mr. Moore informed me, just before arriving at heading-in switch at Tolar, that he would stay at the heading-in, or about the heading-in, switch and allow the train to pull by, in order, if there were any brakes sticking, wheels sliding or journals running hot, to find it out and notify me by putting out caboose semaphores as we pulled train through passing track, and close heading-out switch. He informed me that fireman Delaney volunteered to open heading-out switch, that is, the switch we would go out through when we left Tolar. He told me that the fireman would do that service for him. In view of that understanding had there with brakeman Moore, I did not expect him to try to get on the freight train at all going through the switch. If it had been his purpose to line the switch going out of Tolar, it is usual and customary for him to get on the engine and ride down. He didn't do it on this occasion and I didn't expect him to, from what he said. It was the understanding he was not going to. So I didn't expect him to try to get on the train at all. He was going to stand there and watch the train as it went by. Brakeman Moore was standing inside the passing track, about the clearance post between the passing track and main line, as I came by. He was standing [fol. 81] there at my last view of him, probably a few cars west of the station, that is, while I was west of the station. At that time I closed throttle, causing smoke to come from locomotive and whip down on train to where my view was obscured of all sight back on the right side of train. I couldn't see for the smoke, I could see nothing. As I came by on locomotive, brakeman Moore had flag rolled up on the staff and made an attempt to pitch flag in the deck of the locomotive. I mean that he threw his flag up to the

deck, but the flag struck engine steps and was knocked back on ground just about brakeman Moore's feet. He reached down and picked up flag and was standing with flag staff in hand, facing train, looking at the train, at my last view of him. I cleared the main line approximately at 9:55, maybe 56. The conductor's report showed 9:54. I might have used a small time before I pulled out watch to see what the exact time was. I did pull out my watch to see the time. At that time I did not know that brakeman Moore had been killed, but I did know that I was meeting a passenger, a first class train, there. I didn't see the accident. I got off my engine there but I didn't go down by the side of the train. I got down off the engine and replaced right ash pan squirt hose and got up on the engine, and when No. 22 arrived, fireman Delaney opened switch and I started moving train out of passing track slowly. I was going on, that was the understanding, and they pulled the air on me. In going into that passing track, and all the time I was in motion there, there were no jerks or jars of the train. The grade might have been a little bit down, and it might have been just a little bit up at the point going in, but the grade was practically level at a point almost to west end of passing track.

Cross-examination:

I arrived at the place I stopped, near the entering switch point, at 9:46 or 9:48, it wasn't later than 9:48. I had the [fol. 82] train moving at 9:49, and I approximated it would take it around one minute or a minute and a half to release brakes on train and get train moving again. I didn't look to see what time it was when I stopped, but I did look when I started. When I stopped, I stopped about 50 steps east of the switch, in that neighborhood. When I started, I went very slowly until I got over the switch points, until my engine was in or about the clearance post. For somewhere around 200 feet I made it a point to go very slowly before I began to pick up speed. I got up to a speed of approximately five or six miles an hour during that 200 feet. When I started I was not going that fast. Then I began to ease more steam into the cylinders. I was using steam, working slow, and I gave a little more and increased

my rate of speed until I got to approximately twelve miles an hour. That was less than half way the distance. I eased off steam less than half the distance, but I began to slow train down around in the neighborhood of half the distance. I eased throttle off about in front of station, which would be ten cars, approximately, inside of passing track, considerably less than half the distance. I gradually commenced to slow up at half the distance, and got slower as I proceeded to the other end of the passing track. From my maximum speed of twelve miles an hour, at a point less than half the distance, I began to slow up, and when I got to the other end I was going about the same as heading in. On the whole distance I likely averaged six or seven miles an hour, probably a little better average than that. I didn't have a distance of about a mile to go, I had to go approximately 4100 feet. I had 110 cars, which is between 4100 and 4200 feet. The cars covered hardly 4200 feet, add the engine and it would be right about 4300 feet. With the 150 feet extra to come to the switch point, would make it around 4400 feet. I believe a mile is 5400 feet. Krider was the name of the last station we had passed. [fol. 83] When we left there, there was a discussion as to whether I would have time to make stop and release brakes and clear train at Tolar without endangering tearing train up and delaying No. 22, but we had sufficient time to clear the train. We didn't have sufficient time to clear within the five minute rule without flag protection. We had sufficient time, but not to clear according to Hoyle. We had time to clear within the five minute rule if everything worked all right. We used a little more time than ordinary to be sure not to tear train up and delay No. 22. No, we didn't have time to clear within the five minute rule. I cleared the main line about two minutes before. According to my first estimate, I said I cleared it at 9:55 or 9:56. I said that was approximate. If it was 9:56, I had one minute, and the rule required five. The only way I had the right to make that run and make that clearance, was for Mr. Moore or the fireman to flag that train. It is the duty of the brakeman to flag the train, but in the absence of the brakeman, I have a right to require the fireman. It was the duty of Mr. Moore, the head brakeman, to flag that train and he had a flag. If Mr. Moore was going to flag

that train, it was his business to go as far up the main line track to flag it as he could get. In going up the main line track as far as he could get, ordinarily he would get on the train and ride it, if that was his purpose. If that was his purpose, to flag that train, he would always get on the engine and ride as far up as he could. The engine couldn't pass while he was looking at hot boxes, because the engine comes ahead of the hot boxes. If they are going to flag, they always get on the engine. Sometimes they get on one of the head cars, but ordinarily they get on the engine. Yes, they sometimes get on one of the head cars. He would have been in his line of duty to do that, to get on one of the head cars for the purpose of being up the track to flag No. 22. The fireman told me he could see the train [fol. 84] at Taiban, I didn't take the time to go over to look, I just took his word for it. Mr. Moore couldn't see it. I made a statement about this right after it happened. I believe it was the next day after it happened, when I made that statement, or probably the second day. I don't remember whether I said anything in that statement about Mr. Moore making an effort to throw the flag into the engine, I don't think I did. As to whether I had any reason for leaving it out—I will say I had no reason for putting it in. My reason for testifying to it was because I was asked the question. (Referring to statement.) I don't believe there is anything about that in this statement, it was in one other statement I made to the Claim Adjuster, Mr. Miller, just a few days later than that. No, I didn't put that in the statement when I got to the Claim Adjuster. In making that out, it never entered my mind to put that in, but in making the one to Mr. Miller, it come to my mind about it and I told him about it.

Redirect examination:

I did put it in a signed statement. Could I add something? I was kind enough to give Mr. Saulsbury that statement, and he promised to return that statement and he never did. (Returned to witness by Mr. Saulsbury.)

Recross-examination:

I wanted it returned because I keep a copy for years back, to look over and see what happened in my railroad

career. He asked me for the statement and I told him I had nothing to cover up or hide from Mrs. Moore or anyone else, and he could have the statement, but I would like for him to return it, and the statement was never returned before. I never gave him a copy of the statement I made to the Claim Adjuster, he never came around after that, he came about the time I made the statement to the Claim Adjuster, and I probably wouldn't have given it to him [fol. 85] if he had asked me to.

W. J. SMITH, a witness for defendant, being duly sworn, testified as follows:

My name is W. J. Smith and I am a conductor in the service of the Santa Fe. I was the conductor on the freight train running between Clovis and Vaughan February 15th, 1927, when brakeman Moore was killed. I have my train book. This train book shows the consist of my train, in the order in which the cars were in it. Referring to this train book, I had in there R. F. D. car 13476, it was the thirty-fourth car back of the engine. It was a refrigerator car and was empty. I saw that car the next day at Vaughan and I saw evidence of blood on the wheels of it. I didn't see blood on any other car. It was the thirty-fourth car back from the engine. I knew that train No. 22 was running in the opposite direction to us that day and I knew what time that train was due at Tolar. It was due at 9:57. It was my duty to get out of the way of that train. We reached the switch at Tolar at 9:48. I know that because I looked at my watch. I looked at my watch for that information, because I knew the passenger train was coming and I was watching the time for the clearance. I was riding in the way car, that is on the extreme rear end of the train. I stayed in that car while the freight train was going into the passing track. I could tell, from my position in the way car, how the train was being handled by the engineer. The train was handled in what I would term the regular way, there was no rough handling, no extra jars. In taking the slack out of cars, there is what they call the slack action of the train. It can be handled very rough. There is necessarily a slack action, that is universal in freight train movements. We were going west.

[fol. 86] The grade, from where the train had stopped to head in, shows 0.6%, just a little over one-half of one per cent.; down grade. The engineer or fireman on a train at Tolar can see a train at Taiban. You can see from Tolar to Taiban. From the head end of a train, you would be able to see the location of a train either way. It was possible for the engine crew on our freight train to actually know where that passenger train was if it was at Taiban or east of Taiban. Between Taiban and Tolar they could see where it was all the time. Our train stopped in the switch at 9:54. I know that because I looked at my watch. My purpose in looking was to absolutely know the time I cleared, for my own record. I don't make a written record at the time that I would clear. I actually know, from an examination of my watch, at the time the thing happened, that I came to rest with my train at 9:54, and the passenger train was not due there until fifty-seven. I was in the clear in the switch three minutes before the passenger train was due to leave Tolar, there is one time shown. Tolar is not a regular stop for that train, unless they get a flag, they go right on through. I didn't see this accident. I went down to the place of the accident. I am familiar with the roadway and passageway in between the passing track and the main line along there. The condition, so far as I know, was all right at the time of the accident, I saw no obstructions. There was nothing that I saw along in there that, walking along and looking at it, would be calculated to cause injury to a trainman. I didn't know anything about the arrangement that had been had between the fireman and brakeman Moore about opening the switch going out. Ordinarily it is the duty of the head brakeman to open the switch in pulling out on the main line, that is one of his duties. It is also his duty to open the switch when going into a passing track. There is many duties for the brakeman to perform, and he had a duty of [fol. 87] inspection of the train when it comes to rest in the clear of the main line, where it is possible for him to do so. I don't know what Mr. Moore was doing at the time he was killed.

Cross-examination:

Among other duties that the head brakeman would have, if we were running in to Tolar switch on short time, would

be his duty to flag against No. 22. And in order to flag against No. 22, he ought to be as far up the main line track as he could get, that would be his duty to get there. In the discharge of his duty to flag No. 22 as far up the main line as he could get, so as to make his flagging effective, he could, of course, have gotten on the engine and ridden up to a point where he could see this train. If he had been doing that, it would have been in line of his duty. I stopped my train in the clear at 9:54, that was in the clear of the main line. I made no record of it, but I looked at my watch and remember it was 9:54. If Mr. Delaney remembered it was 9:55, that would make two minutes' clearance, according to that last statement, and three according to mine. If the engineer remembered it 56, it would only be one minute's clearance. Neither one of the three would be sufficient to come within the five minute rule. From Mr. Moore's location along the north side of the train, after the train had pulled by him, he could not see the passenger train coming over at Taiban. I noticed that on this particular occasion there was no rough handling of the train. There was nothing to call my attention to make me notice whether there was going to be any rough handling at that particular time. I usually remember about rough handling, because there are not a great many cases. There had been no rough handling on the whole trip. The train jerked in two at Tolar, I was responsible for that. When we were passing Krider, Mr. Mayhall and I discussed the question of whether we had time to make Tolar. That is not [fol. 88] unusual at all. I do not remember any discussion between Mr. Mayhall and myself in regard to sawing the train if we stopped at Krider, the discussion took place in regard to having the time to go to Krider. I don't remember saying at Krider, "if we take the siding here, we will have to saw." I figured, when he started to Tolar, that I had time to make Tolar and protect the train in the regular way, as permissible by the rule. As to whether Mr. Mayhall and I discussed the fact that we would have time to get there, not within the rule, but by using the flag by the head brakeman,—I will say the flag was not discussed, that he would use the flag. I don't remember of much discussion in regard to going on to Tolar, and I don't remember speaking about not having time to get there within the

five minute rule, other than figuring that I had—. I am sure I did not say to Mr. Mayhall that I did not have time to get to Tolar. If I arrived there in time to protect the head of my train, in clearing a train of 110 cars, it is all in your judgment in regard to the time consumed. As to whether Mr. Mayhall and I discussed the question of getting to Tolar and decided that we didn't have time, and said we didn't have time, to get there within the five minute rule, but we would go on and use the flag—I will say that I don't remember of any such discussion as that. I can't say it didn't happen, I don't remember. As to my wanting to say what I figured—no, there is nothing further I wanted to say.

Redirect examination:

As to its being largely in my discretion to decide whether or not we would go on to Tolar and get in the clear for the passenger train—I will say I figured I had time to make Tolar, and if I did not get in the clear, I figured I would be there in plenty of time to protect the head of my train, as permissible by the rules. I did get there in time, I was there at 48. I got there before the passenger train [fol. 89] came. I was all at ease in the passing track when the passenger train came.

Recross-examination:

The rule prescribed you must clear a first class train five minutes or protect by rule 99 or a flag. This train was protected by flag.

MAX B. MILLER, a witness for defendant, being duly sworn, testified as follows:

I am with the Santa Fe Railroad. I am a rodman in the engineering department. I know where Tolar is. I was with the engineering department in February, 1927. I had occasion to go down to Tolar and make some inspection and measurement some time shortly after February 15th, 1927. I did that with reference to the accident that had happened to brakeman Moore. We made our measurements and located the points that needed to be located, such as switch, depot, point where Mr. Moore attempted

to get on the train and the point where he fell under the train. I made an inspection of the ground in between the passing track and the main line. I found nothing except the ordinary conditions that are between any main line and passing track at any other station. I was there the day after the accident, the 16th day of February. I was there for the purpose of ascertaining all of the conditions that existed there. There was no hole along by the side of the track between the main line and the passing track. That passageway in there was clear, there was no hole there. That passageway is made of crushed rock, called screenings, that have been packed very hard. I haven't the measurement of the distance from that road crossing, that goes across the tracks east of the depot, down to the [fol. 90] depot, we do not have that measurement. The length of that switch, of the track itself, at that time was 6500 feet, I believe. A train of 110 cars would cover a distance of 4900 feet. I saw signs of blood on the track. The ground around that place was clear, and it was clear for a distance of eight or ten feet before you reached the blood. I am familiar with this blue print, it shows the road crossing. With the use of this blue print, by scaling it I could tell the distance from that road crossing to the depot, but I haven't a scale with me. I would say that the distance from the road crossing here to the depot was approximately 300 feet.

Cross-examination:

The agent down there at that time was Mr. Traylor. I met him when I was down there. He told me he saw the accident. He is here. A train of 110 cars was 4900 feet long, I stated. That does not include the engine. The engine would add about 150 feet. The length of that train was 5050 feet.

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JOHN L. MAYHALL, having been recalled by defendant, testified as follows:

I was on the witness stand yesterday morning, called by the plaintiff. I don't believe I was asked anything about the condition of the ground in between the main line

track and the passing track at the time of this accident. I had been running over that piece of track ten years and I was familiar with it. I walked down that pathway that morning and it seemed to be in good condition. I walked down there after the accident. I walked along by the side of that string of cars, in between the main line and the passing track. I didn't see any holes there. As compared with the usual walkways along the line of road at other [fol. 91] places, that walkway was in the same condition. After the accident, there were other people walking up and down there that morning, several different people walked up and down there.

GROVER S. GUYER, a witness for defendant, being duly sworn, testified as follows:

My name is Grover S. Guyer and I am a train dispatcher in the service of the Atchison, Topeka & Santa Fe Railway Company. I have had that position about fifteen years. In February, 1927, I covered the district known as the first district, between Vaughan and Clovis. On the 15th of February, 1927, I was a train dispatcher on duty at Clovis. As a train dispatcher, my duty is to direct the movements of the train over the district in which I preside. I have what is known as a train sheet. That train sheet registers the time of arrival and departure at stations, and names of members of the crew, and other information that is called for. It is a regular train record kept by the railroad, showing the train movements. Train No. 22 was a first class passenger train. (Referring to train sheet) Train No. 22, on February 15th, 1927, arrived at Taiban at 9:50 a. m. and arrived at Tolar at 10.01 a. m. The time of departure from Taiban was 9:52 and it arrived at Tolar at 10:01. The distance between Taiban and Tolar is 4.3 miles. On this date we were operating this district under time-table No. 48. Tolar is a flag stop for No. 22. Train No. 22 was due at Tolar at 9:57 a. m. On this date, it arrived at Tolar four minutes late. It was about two minutes late leaving Taiban. The freight train, on which J. M. Moore was brakeman on this date, was Extra 3811 westbound. Extra 3811 cleared the main

track at Tolar, according to my train sheet, at 9:55 a. m. That was six minutes before the passenger train reached [fol. 92] there that morning. I said it was 4.3 miles from Tolar to Taiban. I am familiar, generally, with the tracks there. A person on an engine at Tolar cannot see a train at Taiban, however you can see a distance just beyond Taiban, a little west, however, not very far. I would say perhaps a half mile beyond Taiban, that is, west of Taiban, you can see a train from Tolar, but I don't believe that you can see a train leaving Taiban, however, you can distinguish that the train is moving by the smoke from the locomotive. You can do that. W. J. Smith was the conductor on this freight train. That was an extra train, under our rules. It was the duty of that train to keep out of the way of the passenger train. The last siding before Tolar was Krider, that is 5.6 miles from Tolar. I have no record showing when he left Krider, it is a blind siding. These conductors are supposed to know the time-table on the passenger trains, they have the time-table with them. I believe he used discretion about running into Tolar that morning, there was nothing unusual about him making this meeting point. There was nothing unusual about it.

Cross-examination:

As to how I know there was nothing unusual about it, not knowing what time he left Krider—I will say I base my opinion on the time he left the last open telegraph office. That wouldn't show what time he left Krider. I don't know, except from hearsay, what time he left Krider. I wouldn't consider there was anything unusual about the run at all. My record doesn't show the time he left the last siding previous to arrival at Tolar. He had plenty of time to reach Tolar, considering the time they left the last open telegraph office, that is, if nothing delayed him by the time he got to Krider. I am basing my judgment on my figures from the last open telegraph office, that is the way we work. From actual knowledge, no, sir, I don't believe I would know [fol. 93] that there was nothing unusual. Just assuming he got there in the usual time, there was nothing unusual. This record I have shows that the clearing of the Tolar switch by this extra train was at 9:55. That gave about a

two minute clearance as against the due time of No. 22. That report was sent to me by the agent at Tolar. Mr. Traylor was the agent there at that time. He is here, I saw him this morning. That is all the knowledge I have, and can have, about the time that freight train cleared that siding, just the report Mr. Traylor sent in after this accident, and that was given to me as 9:55. Mr. Traylor also sent me the notice, after the accident, of the actual arriving time of No. 22, and that is shown to be 10.01 or four minutes late. As to whether, under the rules of our company, they did not have the right to make that siding clearance under five minutes from the due time of that train—I will say they are supposed to use their judgment in respect to that. They are supposed to clear the train five minutes. When they decide to exercise their discretion and run on to a siding, when they have less than five minutes to make the clearance as against the due time of the passenger train, under the rules they are required to provide protection. One protection is a flag in the hands of the head brakeman. If this train arrived at Tolar switch and was going in and making the clearance in less than five minutes, as against the due time of the train, it was the duty of either the head brakeman or fireman to flag the on-coming passenger train. It is the duty of the head brakeman, and in case he didn't, it was the duty of the fireman. In accomplishing that duty for his company, it would be his duty to so situate himself that he would be as far up the main line toward the passenger train as possible when he did flag it if other duties didn't conflict. That would be his duty if other duties didn't conflict. It would be either his duty or the fireman's. In case he under- [fol. 94] took it, I believe it would be his main duty to look after the flagging of the train, and, in doing that, to place himself as far up the main line track as he possibly could, in order that his flagging would be effective. That is correct. If the train, in pulling in on the siding, was going faster than he could walk or run, it would be his duty to ride the foremost part, be in the foremost position of the train he could get—if the train started up before he caught it, to catch toward the front and be as far up the track as he could be. If he was accomplishing this work that way, if he was running along by the side of the train, with a view of boarding that train and getting as far up the main line as he could to flag No. 22, I believe he was in the direct perform-

ance and discharge of his duty. I knew Mr. Moore. I couldn't answer as to whether he was a very cautious man. I worked with him just as a road man, just like I worked with all of the rest, I didn't work directly with them, they worked under me. I said it was the duty of the conductor to know the time-table, it was the duty of every member of the crew. It was the duty of Mr. Moore to know that and the others, the engineer and fireman. Sitting in the engine at Tolar switch, I don't know whether you can see a train standing at Taiban, I don't think you can.

Redirect examination:

I never made that test, sit in an engine at Tolar and look toward Taiban, so I don't know. Supposing that on the occasion in question the fireman and the brakeman, Mr. Moore, had had an understanding in advance that the brakeman would get off and watch the train as it went by and the fireman would throw the switch for him, I wouldn't think that under those conditions there would be any occasion for that brakeman to get on the train at all, with that under- [fol. 95] standing between the two employees. The last open telegraph station that I got a report from Extra 3811 west, before it got to Tolar, was at Melrose, New Mexico, at 9:20 a. m., it passed there at 9:20 a. m. That station is 17.6 miles from Tolar. Freight trains may make a maximum speed of forty miles an hour. There is discretion allowed as to the speed, it is the engineer's judgment. If, in exercising that judgment, he concluded it could go to Tolar, there was nothing out of the ordinary about it. If there is no necessity to flag the train, then there is not an obligation on anybody to flag. If there is no necessity, then there is no duty to do it.

Recross-examination:

There is always necessity to flag when you are pulling into a siding against a first class passenger train, when your clearance is only going to be one or two minutes, that always calls for a necessity, if it doesn't conflict with the rules of safety. If this train was coming in and making a clearance of less than five minutes, if he couldn't see the approach of the train where he could get in the clear, of course, it would be his duty to protect his life and property against the colli-

sion—if the vision was obstructed to a point where he couldn't see. If Mr. Moore couldn't see that passenger train was far enough off it was out of danger, and knowing he was coming in there on short time, it was his first duty to go up to be in a position to flag against that train to save life and property unless he had made other arrangements, unless he arranged with somebody else to do that flagging. I don't know what arrangements he and the fireman had made. If the only arrangement he made with the fireman was simply to open the switch at the other end of the siding, that would still leave on Mr. Moore the duty about flagging—if that is all the arrangements he made, yes.

[fol. 96] Redirect examination:

If the line of vision was such that the crew of this train could see where the passenger was and know they had time to get in, and this brakeman gets off for the purpose of watching the cars as they go by to see there are no hot boxes or slipping wheels, and if the only duty he had with the flag was to protect against a breakdown or some accident to his train, in other words, if the approaching passenger train is in plain view of the crew and they know that unless some accident or something happens they have time to get in the clear, then, in that condition, there is no occasion to flag. I believe, then, the only necessity for flagging would be if something happened to the train.

Recross-examination:

Somebody else seeing the train I wouldn't think would relieve Mr. Moore of the duty of flagging.

J. B. Raymond, a witness for defendant, being duly sworn, testified as follows:

My name is J. B. Raymond and I am division engineer on the Santa Fe. In February, 1927, I covered the Pecos Division, between Clovis and Belen and from Clovis to Pecos. That covered the district between Clovis and Vaughan. I remember the occasion when brakeman Moore was killed at Tolar. I was on the eastbound passenger train, No. 22, that morning. I got off of the train and saw the body. I made

an inspection of the roadway and track along there. The ground in between the main line and passing track, along where he was killed, was in a good, uniform, solid condition. There were no holes there. I examined it. I saw where the body was, and covering a space of one hundred feet east of where the body was, there was no hole in the ground.

[fol. 97] WALKER SAULSBURY, of counsel for Plaintiff, called called as a witness by defendant, testified as follows:

There were two depositions taken in this case of the witness E. L. Traylor. They were taken on our interrogations and yours—your crosses. We propounded the interrogations and you simply crossed them.

Plaintiff and Defendant Close.

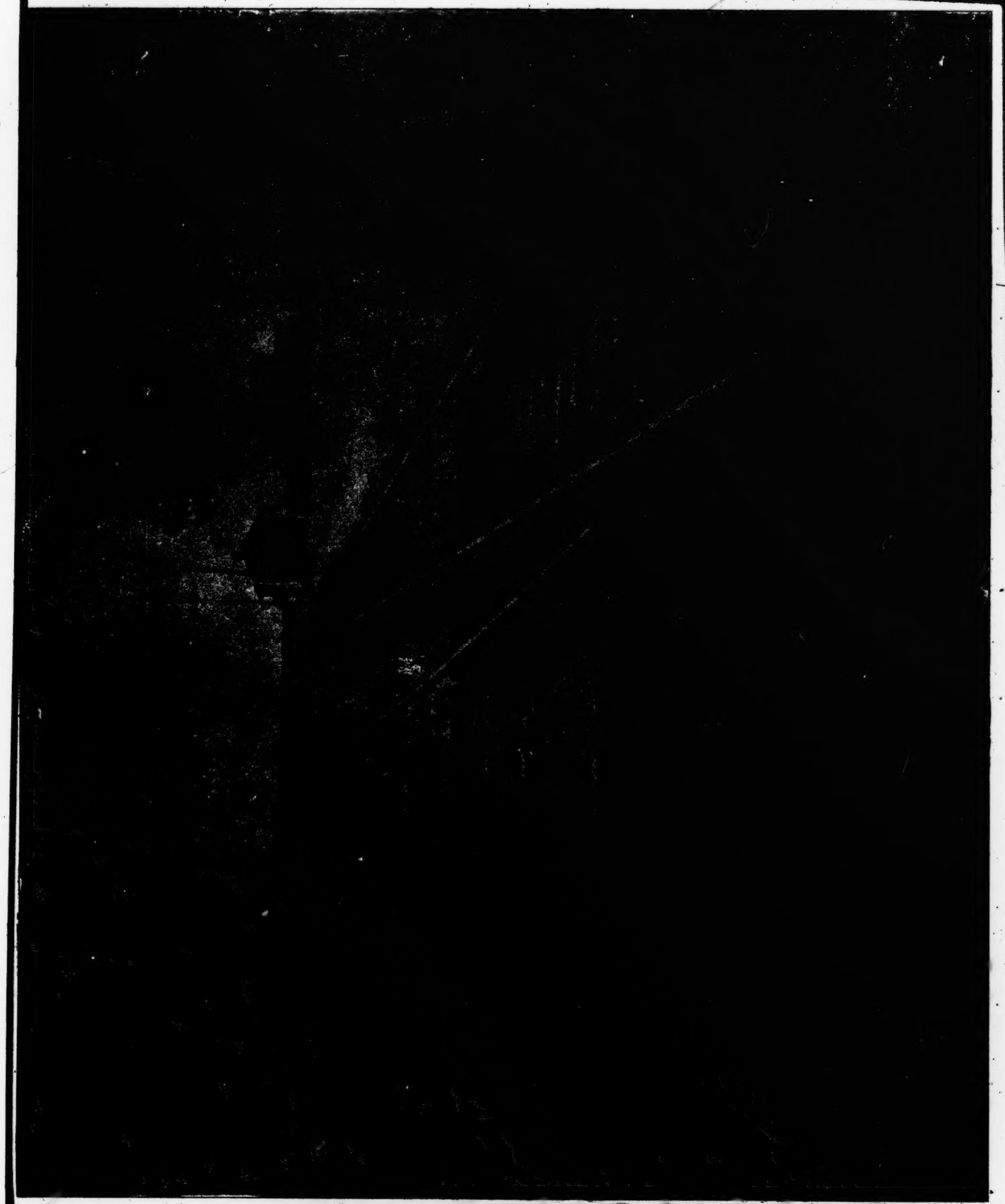
(Here follow Defendant's Exhibits A, B, and C, side folios 98, 99, and 100)

Defendant's Exhibit A

Cruelty to Stock
Ruth Moore

No.3---This view taken by me at Tolar, N.M., on February 19th, 1927, with camera set up astride of North rail of passing track, 65 feet west of the passing track east switch, with lenz 4-1/2 feet above the ground, and looking Westward. View shows particularly the ground from there west between passing track and main line

R O Robinson Photographer
Clovis N M



Cause No 2076 80
J.W. Moore

Defendant's Exhibit B

No.1---This view taken by me at Tolar, N.M., on February 19th, 1927, with camera set up at North side of passing track at a place 28 feet west of where agent Traylor indicated that the body of J.W.Moore was lying after the accident. The lenz was 4-1/2 ft above the ground, and view showing in particular the ground, track, etc at place of accident, and also on down between the passing track and main line east from place of accident.

R.O Robinson Photographer
Clovis N.M

Exhibit B

Cauble No 20960
J.W. Moore

Defendant's Exhibit C

No.2---This view taken by me at Tolar, N.M., on February 19th, 1927, with camera set up astride of North rail of Main line, some 15 feet North of the place indicated by agent Traylor that body of J.W.Moore was lying after accident, with lenz about 3-1/2 ft above the ground looking South. The view shows in particular the North side of the North rail of passing track and end of ties and surrounding ground at place of accident. A small pile of rocks is shown on North end of tie at place indicated by agent Traylor as where upper end of body was lying.

R.B.Robinson Photographer
Clovis N. M

Exhibit C

[fol. 101] STIPULATION TO STATEMENT OF FACTS

We, the parties to the above numbered and entitled cause, hereby agree that the above and foregoing statement of facts, made up in duplicate, is a true and correct statement of all the facts admitted and of all the evidence introduced on the trial of said cause.

Witness our hands in duplicate, on this the 26 day of June, A. D. 1929.

Winbourn Pearce, Attorneys for Plaintiff. Turney, Burges, Culwell & Pollard, Attorneys for Defendant.

ORDER SETTLING STATEMENT OF FACTS

The above and foregoing statement of facts, made up in duplicate, having been submitted to me and having been examined by me and found correct, and it appearing that the same has been agreed to in duplicate in writing by the parties to said cause, the same is hereby approved as the correct statement of facts in the above styled cause in duplicate, and it is ordered that the same be filed as a part of the record in said cause on this the 26th day of June, A. D. 1929.

Ballard Coldwell, Judge Sixty-fifth Judicial District of Texas.

[fol. 102] PROCEEDINGS IN COURT OF CIVIL APPEALS

No. 2358

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant,

vs.

MACK SAXON, Ancillary Administrator and Personal Representative in Texas in the Estate of J. W. Moore, Deceased, Appellee

Appeal from the District Court of El Paso County, Texas

OPINION COURT OF CIVIL APPEALS—Filed 24th Oct., 1929

This suit was brought in the Sixty-fifth District Court of El Paso County, Texas, by Mack Saxon, Ancillary Ad-

ministrator in Texas of the estate of J. W. Moore, deceased, against Atchison, Topeka & Santa Fe Railway Company, for damages for personal injuries resulting in the death of J. W. Moore, in the state of New Mexico, on February 15th, 1927.

On said date J. W. Moore, deceased, was head brakeman on a freight train of Atchison, Topeka & Santa Fe Railway Company, running west from Clovis, New Mexico, to Vaughan, New Mexico. At Tolar, a small station between said places, Moore fell under one of the cars of the freight train of which he was head brakeman, and was instantly killed. Moore's surviving wife, Mrs. Bertha Moore, duly qualified as administratrix of her husband's estate, in New Mexico, and as such administratrix, filed this suit for herself and her two minor children, for damages growing out of the death of J. W. Moore. Appellee, Mack Saxon, duly qualified as the ancillary administrator and personal representative in Texas of the estate of J. W. Moore, deceased, and as such, intervened in this suit, and the trial of this case was prosecuted to final judgment by Mack Saxon in the capacity stated.

[fol. 103] Appellee Saxon alleged the death of J. W. Moore, that he was killed at Tolar, New Mexico, while in the discharge of his duties as head brakeman of appellant railway company, without fault on the part of J. W. Moore, deceased; that appellant was a common carrier engaged in interstate commerce; that the deceased, Moore, received the injuries resulting in his death while in appellant's service handling interstate commerce, and that the injuries to and the death of J. W. Moore, deceased, were proximately caused by the negligence of appellant railway company, and assigned several acts of negligence, among them the fast running of the freight train, and rough handling; however, the only ones submitted by the trial court to the jury being alleged, substantially, as follows: At said time and at the station Tolar, J. W. Moore, the deceased, had thrown the switch, permitting the entrance of said freight train into said side or passing track, and had, with a flag in his hand, as his duty required, proceeded up the main line track for the purpose of flagging an incoming passenger train, and that as the freight train entered onto the side or passing track, and proceeded to the other end of the track, J. W. Moore, deceased, as required by his duty, crossed over to

the side of said freight train for the purpose of boarding the same, and riding to the further end of the side track, in order to be in better position to discharge the duties required of him with reference to the flagging of said passenger train; that on the side of the passing track or switch track next to the main line, is a well marked and beaten path, wherein brakemen and trainmen in discharge of like duties, traveled. That the deceased, J. W. Moore, in the discharge of his duties, was walking and running in said pathway, and while so engaged, by reason of a large hole or soft place in said pathway, was caused to be thrown or fall under said train, and killed.

[fol. 104] The specific negligence assigned is alleged to be in causing or making a hole and depression in the said pathway and in maintaining and keeping said hole and depression and soft place in said pathway; and thereby negligence in failing to furnish deceased a reasonably safe place to work.

In addition to the general denial, appellant plead, in substance, that deceased, Moore, was an experienced brakeman who knew the location of the tracks and the purpose of the train movement at the time of the accident; that he was familiar with the pathway in question, knew the speed of the passing freight train, and that if he undertook to get on the train on the passing track he did so voluntarily and merely to serve a purpose of his own; that his duties did not require him on the train at that time, and that none of the other employees expected that he would attempt to get on the train; that his only duty was to remain on the ground and close the switch after the passenger train had passed; that if he put himself in a position of danger, he did so voluntarily. Appellant plead assumed risk and negligence on the part of the deceased under and in respect to the circumstances and facts as set up.

The case was submitted to the jury on special issues. After the evidence was heard and before its submission appellant presented its motion for an instructed verdict, which was refused. Appellant's motion for judgment on the answers returned was likewise refused. Judgment was entered for appellee on the answers of the jury on the issues submitted.

On the issues submitted the jury made the following findings:

1. At the time and place alleged by plaintiff (appellee) there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff.

[fol. 105] 2. The deceased, J. W. Moore, was running along the track as alleged, and while doing so and attempting to board one of the cars with which he was working he stepped on or upon such soft area or hole and was thereby caused to fall and be injured.

3. The presence of such soft area or hole was due to the negligence of the defendant.

4. Such negligence was a proximate cause of the accident and injury to the deceased, J. W. Moore.

5. Deceased J. W. Moore, did not know of such soft area or hole and by the use of ordinary care incident to his employment would not have known of it.

6. The accident or injury to the deceased complained of was not due to some other risks of the employment assumed by the deceased.

7. States the reasonable compensation appellee is entitled to recover as the damages sustained.

On the verdict of the jury the court entered judgment for appellee and against appellant for the amount of damages found.

Appellant railroad company filed a motion for new trial, which the court overruled, to which appellant excepted and gave notice of, and has perfected this appeal.

OPINION, WALTHALL, J.

It is admitted that the cause arises under the Federal Employers' Liability Act. Under that Act negligence, as the proximate cause of the death of J. W. Moore, on the part of the appellee railway company must be established.

Appellant submits that appellee has not met that burden. Judgment was entered against appellant based upon the affirmative finding of the jury to the effect that there was a soft area or hole between the tracks of the appellant's

lines, and that deceased, while running along the tracks in an attempt to board one of the cars in the moving train, [fol. 106] stepped upon such soft area or hole, which caused him to fall. In discussing the question presented we will omit a statement of the evidence offered to show that at the time deceased was killed he was in the discharge of his duty as head brakeman on the train, and assume that he was in discharge of his duty as such. The freight train on which deceased was brakeman, consisted of 110 cars, was headed west, and had been run in on the siding at the station Tolar, to let pass an east bound passenger train, then about due. The deceased had thrown the switch between the siding and the main line. He would then have to get back on the train and go toward the front and be there to let the train out on the main line, and to flag the incoming passenger train in the event it was necessary to do so.

Witness C. E. Mahon testified that he saw the freight train as it was pulling into the siding and saw the deceased. said:

"When I saw Mr. Moore he was running along by the side of the train and he just reached up like he was going to catch on, but he didn't raise himself off the ground, the best I could see he didn't catch it. He caught at it but didn't catch it. When I saw him first make the motion as though he was getting on the train, it looked like it was something like about three car lengths behind the engine. After that he ran on west, the same way the train was going. * * * After making this first motion while he was running along by the side of the train about the third car, he continued to run along with the train. The train was outrunning him. Then I saw him make another attempt; that is, reach like he was going to catch again. That was the same kind of reaching as before, but I never did see him raise himself off the ground. He made the same kind of motion toward the car as before. Then he was out of my sight. He was running the last time I saw him and went out of my sight. I never saw him any more after he went out of my sight until he was killed. I know approximately where the place is, my son, (Leonard Mahon) pointed out to me where he saw a foot-print in a soft place, I know about where it is. I know where Mr. Moore was killed. I went there after he was killed. I saw the place where he

was killed under the train and know where that place is. Where my son said this hole was, the last time I saw Mr. Moore, he was east of this hole, but he was killed west of where this hole was. I suppose he passed over that place after he went out of my sight and before he was killed; he was west of this hole when he was killed and he was east [fol. 107] of it when I saw him go out of my sight. Oh, it must have been something like maybe fifty or sixty feet, in my best judgment, from the place he went out of my sight to the place he was killed. It must have been something like eight or ten feet, possibly twelve, not so very far, from the place he was killed back to the place where this footprint was. * * * I thought this freight train was running just a little bit faster than common in taking that siding. I saw the passenger train west of there, about a mile west, and this freight train was coming in from the east. * * * There was nothing unusual about the movement of the train (freight) only it just seemed like it was trying to get in in plenty of time, trying to pick up speed enough to get in and not detain this passenger. What indicated that to me was that it was kind of jerking occasionally."

On cross-examination witness testified, after stating where he was, the location of buildings, distances, etc., said:

"There was nothing particularly unusual to see a brakeman run alongside of a moving freight train at that station. Some catches on at the front and goes down, and sometimes they wait and catch on further back, you see. * * * I went out to the place where this brakeman was found on the ground after his body had been moved. I didn't see him on the ground at all. I don't know just exactly where on the ground his remains were picked up. I went out there and helped pick up some of the bones left. * * * I arrived at my opinion as to the pl-ce he was killed by the blood I saw on the rail."

Leonard Mahon testified: "Am fourteen years old." Did not see the accident. Saw the blood on the track. Said:

"I saw a soft place in the pathway over which the brakeman run, it was three feet wide, probably, and four or five feet long and it was along the siding track; it was just

east of the house track switch. It was a hole filled with cinders or soft substance, and hadn't been packed down. I saw a footprint in that hole, it was pointed west, it was the left foot. I saw a footprint of the left foot, going west. * * * I stepped in it myself. * * * There was just one footprint. The footprint that I saw in there was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest. That hole or soft place was six or eight feet, maybe ten feet, east of the place where Mr. Moore was killed. * * * (Pointing out location of the soft place in picture.) It extended out about three feet from the track, the passing track, and was four or five feet long. * * * I saw a footprint but I don't know who it was that had stepped in there. I was down there about two hours after the accident. * * * I don't know that there were other people walking up and down there between the time of the accident and the time I got down, they said there were. Mr. Traylor and my father were, but I don't know, I wasn't there. I don't know how [fol. 108] many people walked up and down between the time of the accident and the time I got down there."

Irvin Smith testified: Is a schoolboy. Went to place of accident with Leonard Mahon, saw the blood signs where Moore was killed. Said:

"There was a soft place probably eight or ten feet before where he was killed, eight or ten feet of where he was killed. * * * Leonard stepped one foot in it, and called my attention to it. * * * I saw one noticeable footprint in the hole. The footprint was going west. I stepped in the soft place myself; compared to the footprint that I made and the one Leonard made, the footprint in there was a heavier one. It was a man's footprint. The front part was the deepest. It was the left foot. That soft spot was about three feet wide and four feet long, four or five."

R. O. Robinson testified for appellee: Took some photographs at Tolar for the appellant. After stating that he saw the place of the accident, said:

"I also saw a hole or depression in the pathway there, used by brakemen, close to that place. * * * It wasn't

exactly a hole, it was just a little bit lower place than the surrounding ground, not very much lower, but a little lower. It was possibly some six or eight feet long, I judge. * * * but something near that, and possibly three feet wide. It was just a little bit lower than the other ground surrounding it, the same color ground and everything, but just a little bit lower and softer than the surrounding ground. I stepped in it to see how much it would give. As to whether or not it did give sufficiently to cause a man to lose his balance who was running, I will say that, in my opinion, it might cause a man to stumble who was running and it might not. If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment. That hole was right in the pathway. There was a pathway there, it was well beaten. It was the same color, but you could tell it was worn out. That pathway was close to the track. * * * At this particular point the ground was just a little lower and the path was across it. * * * This path wasn't as plain along this place, particularly as on each side. * * * There was nothing rough about it. I judge the passageway along there was about as smooth as they usually are between railroad tracks."

The above is all the evidence in the record offered by appellee as to the hole, soft place, or depression in the pathway, tending to show any possible connection between the deceased and the accident causing his death.

The theory of the appellee, as alleged, and that upon which the case was submitted to the jury undoubtedly is, that the deceased was attempting to get on one of the [fol. 109] freight cars, and stepped in the hole, soft place or depression and was thereby caused to fall under the moving train and was killed. Appellee alleged that the deceased, "in the discharge of his duty and in order that he might flag said passenger train as far up the track as possible, it then and there became the duty of the deceased to board the said freight train and ride the same as it proceeded on toward the end of the said side or passing track"; and again, it is alleged: "as his duty required, (deceased) proceeded up the main line track for the purpose of flagging the said oncoming passenger train, and that as the said freight train entered onto the said side or

passing track, and proceeded to the other end of said track, the deceased as required by his duty, crossed over to the side of said freight train for the purpose of boarding the same, and riding to the further end of the side track". The evidence of the witness Mahon, the only witness who saw the deceased running along by the side of the train, clearly indicates that deceased was attempting to get on the moving train, more than once the witness saw him "catch at it but didn't catch it", "reach like he was going to catch again", "but did not see him raise himself off the ground."

The court submitted the case to the jury in the second issue on the theory that the deceased "while running along the track" and "while attempting to board one of the cars" he stepped upon such soft area or hole and was thereby caused to fall and be injured.

We have referred to the pleading and to Mahon's evidence in view of appellee's suggestion that the facts show deceased only "wanted to board one of the cars". It shows, we think, a continued effort to board the cars.

On the theory upon which the case was submitted the burden was upon appellee to establish the fact that the deceased stepped upon the soft area, depression, or hole, testified about, and that in doing so he was thereby caused [fol. 110] to fall and be injured.

It is only a surmise that the deceased stepped on the soft place. Somebody did, but who or when, is not made to appear. Even if it be conceded that the deceased stepped on the soft area there is nothing to indicate that it caused him to fall. The evidence shows one clean impression of one foot, as one running would make, but no indication at or beyond the footprint by any impression on the ground that the soft ground caused the one running to fall. The nearest to it was by the witness Robinson who said that in his opinion "it might cause a man to stumble who was running and it might not," depending on the circumstances stated. There is no evidence on the ground of a stumble.

It is not made to appear that had the deceased, while running where the footprint was seen, fallen by stepping in the soft ground, he would necessarily or even probably have fallen under the train.

We have concluded that there is not sufficient causal connection shown between the soft area, hole or depression

and the accident causing the death of the deceased upon which to base a finding that the soft area proximately caused the deceased to fall and be injured. The evidence must present something more than a mere conjecture. Bock v. Fellman Dry Goods Company, 212 S. W., 635. In that case the employee fell into an elevator shaft and was killed. There the evidence showed a poorly lighted room with a greasy floor, bearing marks indicating that he slipped and fell through an opening under the bottom of the gate. Here, as said, the evidence shows no marks of any stumbling, slipping or falling by reason of the soft place on the foot-path.

In Davis v. Preston, 264 S. W., 331, and referred to by appellee, a writ of error granted, and case affirmed, 16 S. W. (2d) 117, a case in which Preston, a longfieldman, on a rainy, stormy night was engaged in moving certain coaches from Union Station in Houston, to a storage tank, the end [fol. 111] of which abutted on McKinney avenue. It was Preston's duty to get off the moving coaches, in which he was riding, at McKinney avenue, and at that point to signal the engine crew. Preston was last seen alive when he walked out of one of the coaches just before reaching McKinney avenue. Beginning a few feet south of McKinney avenue steel rails for re-laying the track were strewn between the outbound and inbound mains. A few minutes after Preston got off his hat, wet and heavy, was picked up between the tracks of the inbound main and the next track over. A newly made heel or footprint was found some two or four feet from the north end of the first rail, lying between the inbound and outbound main. The negligent act charged was in leaving the steel rails in the switch yard. The jury found negligence in leaving the loose rails on which Preston stumbled causing him to fall under the moving coaches, and that his death was not caused by other causes mentioned. In that case the witnesses testified that the heel mark "looked like it had just been made." "It seemed to be fresh" and "it seemed to be the heel mark where he (Preston) lit". (In getting off the coach.) It seems to us that the identify of the heel mark, from its location on the ground, its freshness, as testified to by several witnesses, its situation with reference to the loose rails, the uncontroverted evidence that it was in Preston's

line of duty to get off the moving coaches at McKinney avenue, and that he did get off at that point, and had no duty to perform that could, by any reasonable construction, have caused the accident, other than coming in contact with the steel rails about two and a half — from the coach steps, from which Preston alighted, much more clearly identify the heel mark as that of Preston's and the steel rails as causing his fall and injury, than the foot print in this case, and the soft ground as causing Moore's fall.

As said by the Supreme Court in reviewing the Preston [fol. 112] case:

"With evidence disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground about 2½ feet from the end of the rail, with his duties requiring his next step to be made about where he would be tripped by the end of the rail, especially while combatting a 35 mile an hour wind, and with his cap and lantern found about where they would have fallen upon his being tripped by the rail, and with his body actually caught and mangled beneath the cars as they proceeded a short distance farther, there being no evidence of anything save the rail to reasonably account for Preston's fall beneath the train, we would not be justified in holding as a matter of law that a recovery should be denied his administrator on the issue of proximate cause."

A glance at the facts stated, as established, in the above case, will, at once show the difference on the issue of proximate cause between the Preston case and the case at bar.

The case on the facts seems to be fully developed.

For reasons stated, the case is reversed and here rendered for appellant.

A. M. Walthall, Associate Justice.

[fol. 113] JUDGMENT COURT OF CIVIL APPEALS—Entered October 24, 1929

October 24th, 1929.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the

opinion of this Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court be reversed and this Court proceeded to render such judgment as should have been rendered by the Court below, to-wit:

It is therefore considered, ordered, adjudged and decreed by the Court that the Intervenor, Mack Saxon, personal representative in Texas and Ancillary Administrator of the Estate of J. W. Moore, deceased, take nothing by reason of his suit for damages against the defendant, Atchison, Topeka & Santa Fe Railway Company, and that as to the same the said defendant go hence without day and recover its costs in this behalf incurred; that the appellee, Mack Saxon, personal representative in Texas and Ancillary Administrator of the Estate of J. W. Moore, Deceased, pay all costs in this behalf expended and incurred both in this Court and in the Court below for all of which let execution issue, and this decision be certified below for observance.

[fol. 114] [Title omitted]

APPELLEE'S MOTION FOR REHEARING—Filed Nov. 4, 1929

Now comes the appellee and moves the court to set aside the judgment reversing and rendering the above cause, heretofore entered, and to grant a rehearing, and, on such rehearing, to affirm the judgment of the lower court, and to correct errors made by the court in its finding of facts, and for additional finding of facts consistent with the record in this cause, and for grounds of this motion appellee respectfully represents:

1

The court erred in holding that there is not sufficient evidence to support the finding of the jury that defendant's negligence was the proximate cause of the death of deceased.

2

The court erred in holding "that there is not sufficient causal connection shown between the soft area, hole or de-

pression and the accident causing the death of the deceased upon which to base a finding that the soft area proximately caused the deceased to fall and be injured".

3

The court erred in holding that there is not sufficient evidence to support the finding of the jury that defendant's negligence was the proximate cause of the death of deceased, the evidence disclosing that the deceasd, in the discharge of his duty, was running along the pathway toward [fol. 115] the hole or soft area and was last seen within a few feet of the hole, that a footprint, a short time after the injury, was found in this hole or soft area, that the footprint so found was going in the same direction he was seen to be running, that the soft place or hole was directly in the path of deceased, and that he was bound to step in it or over it, that the footprint was a heavy print, that the toe of the footprint was deeper than the heel, that the footprint was made by a man running, that the place desceased fell under the train was about ten feet beyond the hole or soft area, just about the distance he would have fallen under the train if he had stumbled in the hole, that the witness R. O. Robinson, who had been brought to the scene of accident by the defendant to take pictures, after having the hole or soft area pointed out to him by the Railway Company's agent, proved to be an eye witness, "stepped in it to see how much it would give", and there being no evidence of anything, save the hole or soft area, to reasonably account for deceased falling beneath the train, all of said evidence conforming to appellee's allegations.

4

The court erred in holding "that there is not sufficient causal connection shown between the soft area, hole or depression and the accident causing the death of the deceased upon which to base a finding that the soft area proximately caused the deceased to fall and be injured, the evidence disclosing that the deceased, in the discharge of his duty, was running along the pathway toward the hole or soft area and was last seen within a few feet of the hole, that a footprint, a short time after the injury, was found in this hole or soft area, that the footprint so found was going in the

same direction he was seen to be running, that the soft place or hole was directly in the path of deceased, and that he was bound to step in it or over it, that the footprint was [fol. 116] a heavy print, that the toe of the footprint was deeper than the heel, that the footprint was made by a man running, that the place deceased fell under the train was about ten feet beyond the hole or soft area, just about the distance he would have fallen under the train if he had stumbled in the hole, that the witness R. O. Robinson, who had been brought to the scene of accident by the defendant to take pictures, after having the hole or soft area pointed out to him by the Railway Company's agent, proved to be an eye-witness, "stepped in it to see how much it would give", and there being no evidence of anything, save the hole or soft area, to reasonably account for deceased falling beneath the train, all of said evidence conforming to appellee's allegations.

5

The appellee objects and excepts to the failure of the court to include in the finding of facts a finding that the appellant's agent, E. L. Traylot, was an eye witness to the accident, and respectfully asks that such finding be made. In this connection attention is called to the testimony of Max B. Miller, Statement of Facts, page 40:

"The agent down there at that time was Mr. Traylor. I met him when I was down there. He told me he saw the accident. He is here."

6

The appellee objects and excepts to the failure of the court to include in the finding of facts a finding that the witness R. O. Robinson testified that the appellant's agent, E. L. Traylor, had pointed out to him the hole or depression in the pathway, R. O. Robinson's testimony is set out in the opinion of the Court of Civil Appeals, but that part here referred to was omitted from the quotation made by the court. In this connection, attention is called to Statement of Facts, pages 19 and 20, where Mr. Robinson, after having testified he was called to the scene shortly after the accident by the appellant to make photographs, said:

[fol. 117] "I also saw a hole or depression in the pathway there, used by brakemen, close to that place, I had that pointed out to me by the agent, Mr. Traylor."

7

The appellee objects and excepts to the following statement of the evidence in the opinion of the court:

"The nearest to it was by the witness Robinson, who said that in his opinion 'it might cause a man to stumble who was running and it might not' ",

because a correct quotation of the witness' testimony would be:

"I stepped in it to see how much it would give. As to whether or not it would give sufficiently to cause a man to lose his balance who was running, I will say that, in my opinion, it might cause a man to stumble who was running and it might not. If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment."

Notwithstanding the opinion at another place quotes this evidence correctly, inasmuch as the court undertook further on to give a statement of the evidence we respectfully move and request that the court make a statement of the evidence, including all the witness said in this connection.

Argument

By way of argument, we respectfully urge a restudy and a recomparison of Davis vs. Preston (Supreme Court) 16 S. W. (2nd) 117. Fact by fact and circumstance by circumstance. That is all.

Walker Saulsbury, Winbourn Pearce, Attorneys for Appellee.

[fol. 118] [Title omitted]

On Motion for Rehearing

Opinion on Motion—Filed 14th Nov., 1929

Appellee "objects and excepts to the failure of the court to include in the finding of facts a finding that the appel-

lant's agent, E. L. Traylor, was an eye witness to the accident, and respectfully asks that such finding be made."

We add to the findings the uncontradicted statement of the witness, Max B. Miller, as requested in the motion, found in the record, as follows:

"The agent down there at that time was Mr. Traylor. I met him when I was down there. He told me he saw the accident. He is here."

We also add to the statement of the witness Robinson, at the request of appellee, the following:

"I had that (the hole or depression in the pathway there) pointed out to me by the agent, Mr. Traylor."

In requesting the additional statement of the fact that appellant's agent, E. L. Traylor, had said to the witness Miller that he, Traylor, told the witness that he saw the accident, and that Traylor "is here", that is, was present at the trial, we assume that appellee attaches some probative effect to the fact stated, as a presumption or inference, adverse to appellant, to be drawn from the fact that appellant's agent saw the accident, was present and was not called to testify by appellant. But, as we view it, the rule that when one party to a suit is in possession of facts, and it is his duty to disclose them, if he fails or refuses to do so, it will be presumed that they are unfavorable to him, has no application here. The rule is well settled that where [fol. 119] the doctrine of res ipsa loquitur has no application, there was no duty resting upon appellant to explain anything connected with the accident. Here, the witness being present, was as available to appellee as to appellant. Judge German of the Commission of Appeals, Section A, in Davis v. Castle, 257 S. W. 870, fully discusses the question presented, and we need only refer to that case and the cases there referred to, and especially the rule of res ipsa loquitur in L. R. A. 1917 E, pp. 1 to 249, and the cases there referred to.

In considering the case by reason of the rules as above, we attach no importance to the fact that Traylor saw the accident, and was present at the trial.

The motion is granted to the extent only of adding the testimony as requested, but otherwise is overruled.

A. M. Walthall, Associate Justice.

[fol. 120] Order of Court of Civil Appeals on Rehearing—Entered Nov. 14, 1929

November 6th, 1929.—Appellee's motion for a rehearing, submitted.

November 14th, 1929.—On this day coming on to be heard appellee's motion for a rehearing, and the Court having considered the same, is of the opinion that the same should be overruled. Wherefore it is considered, adjudged and ordered that appellee's motion for a rehearing be, and the same is hereby, in all things overruled. Opinion.

[fol. 121] Proceedings in Supreme Court of Texas

In the Supreme Court of Texas

No. —

Mack Saxon, Ancillary Administrator and Personal Representative in Texas in the Estate of J. W. Moore, Deceased, Plaintiff in Error,

vs.

Atchison, Topeka and Santa Fe Railway Company, Defendant in Error

Petition for Writ of Error—Filed Dec. 3, 1929

Application for Writ of Error to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas

To the Honorable Supreme Court of the State of Texas:

Your petitioner, Mack Saxon, ancillary administrator and personal representative in Texas in the estate of J. W. Moore, deceased, respectfully represents that in the above styled cause on October 24th, 1929, the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas reversed a judgment of the trial court theretofore rendered for plaintiff in error in this cause, and rendered judgment in favor of the appellant (defendant in error here), and, in due time, plaintiff in error filed motion for rehearing in the said court of civil appeals, pray-

ing that the judgment reversing and rendering this cause be set aside and that the judgment of the lower court be affirmed; which motion for rehearing was on the 14th day of November, 1929, by the said court of civil appeals, overruled and denied and said judgment thereupon became final.

Statement of the Case

The following is taken from the statement of the case by the court of civil appeals:

[fol. 122] "This suit was brought in the Sixty-fifth District Court of El Paso County, Texas, by Mack Saxon, Ancillary Administrator in Texas of the estate of J. W. Moore, deceased, against Atchison, Topeka and Santa Fe Railway Company, for damages for personal injuries resulting in the death of J. W. Moore, in the State of New Mexico, on February 15th, 1927.

"On said date J. W. Moore, deceased, was head brakeman on a freight train of Atchison, Topeka and Santa Fe Railway Company, running west from Clovis, New Mexico, to Vaughan, New Mexico. At Tolar, a small station between said places, Moore fell under one of the cars of the freight train of which he was head brakeman, and was instantly killed. Moore's surviving wife, Mrs. Bertha Moore, duly qualified as administratrix of her husband's estate, in New Mexico, and as such administratrix, filed this suit for herself and her two minor children, for damages growing out of the death of J. W. Moore. Appellee, Mack Saxon, duly qualified as the ancillary administrator and personal representative in Texas of the estate of J. W. Moore, deceased, and as such, intervened in this suit, and the trial of this case was prosecuted to final judgment by Mack Saxon in the capacity stated.

"Appellee Saxon alleged the death of J. W. Moore, that he was killed at Tolar, New Mexico, while in the discharge of his duties as head brakeman of appellant railway company, without fault on the part of J. W. Moore, deceased; that appellant was a common carrier engaged in interstate commerce; that the deceased, Moore, received the injuries resulting in his death while in appellant's service handling interstate commerce, and that the injuries to and the death of J. W. Moore, deceased, were proximately caused by the

negligence of appellant railway company and assigned several acts of negligence, among them the fast running of the freight train, and rough handling; however, the [fol. 123] only one submitted by the trial court to the jury being alleged, substantially, as follows: At said time and at the station Tolar, J. W. Moore, the deceased, had thrown the switch, permitting the entrance of said freight train into said side or passing track, and had, with a flag in his hand, as his duty required, proceeded up the main line track for the purpose of flagging an incoming passenger train, and that as the freight train entered onto the side or passing track, and proceeded to the other end of the track, J. W. Moore, deceased, as required by his duty, crossed over to the side of said freight train for the purpose of boarding the same, and riding to the further end of the side track, in order to be in better position to discharge the duties required of him with reference to the flagging of said passenger train; that on the side of the passing track or switch track next to the main line, is a well marked and beaten path, wherein brakemen and trainmen in discharge of like duties, traveled. That the deceased, J. W. Moore, in the discharge of his duties, was walking and running in said pathway, and while so engaged, by reason of a large hole, or soft place in said pathway, was caused to be thrown or fall under said train, and killed.

"The specific negligence assigned is alleged to be in causing or making a hole or depression in the said pathway and in maintaining and keeping said hole and depression and soft place in said pathway; and thereby negligence in failing to furnish deceased a reasonably safe place to work.

"In addition to the general denial, appellant plead, in substance, that deceased, Moore, was an experienced brakeman who knew the location of the tracks and the purpose of the train movement at the time of the accident; that he was familiar with the pathway in question, knew the speed of the passing freight train, and that if he undertook to get on the train on the passing track he did so voluntarily, and merely to serve a purpose of his own; [fol. 124] that his duties did not require him on the train at that time, and that none of the other employees expected

that he would attempt to get on the train; that his only duty was to remain on the ground and close the switch after the passenger train had passed; that if he put himself in a position of danger, he did so voluntarily. Appellant plead assumed risk and negligence on the part of the deceased under and in respect to the circumstances and facts as set up.

"The case was submitted to the jury on special issues. After the evidence was heard and before its submission appellant presented its motion for an instructed verdict, which was refused. Appellant's motion for judgment on the answers returned was likewise refused. Judgment was entered for appellee on the answers of the jury of the issues submitted.

"On the issues submitted the jury made the following findings:

"1. At the time and place alleged by plaintiff (appellee) there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff.

"2. The deceased, J. W. Moore, was running along the track, as alleged, and while doing so and attempting to board one of the cars with which he was working he stepped on or upon such soft area or hole and was thereby caused to fall and be injured.

"3. The presence of such soft area or hole was due to the negligence of the defendant.

"4. Such negligence was a proximate cause of the accident and injury to the deceased, J. W. Moore.

"5. Deceased, J. W. Moore, did not know of such soft area or hole and by the use of ordinary care incident to his employment would not have known of it.

"6. The accident or injury to the deceased complained of was not due to some other risks of the employment assumed by the deceased.

"7. States the reasonable compensation appellee is en- [fol. 125] titled to recover as the damages sustained.

"On the verdict of the jury the court entered judgment for appellee and against appellant for the amount of damages found."

See testimony set out in the opinion of court of civil appeals.

The court of civil appeals makes a brief statement of the testimony and undertakes to set out in detail and quotation the testimony of the witnesses tending to show any connection between the hole or soft place and the accident causing the death of deceased. There were, however, in our opinion, a few material omissions. E. L. Traylor was agent for the company at the place of accident and was an eye witness to the accident. R. O. Robinson appeared on the scene at the request of the railway company to make photographs of the place of accident, and Mr. Traylor, who had seen the accident, pointed out the hole in the pathway to Mr. Robinson, the photographer, and Mr. Robinson immediately stepped in the hole to see if it would give enough to cause a man to fall.

In the opinion overruling the motion for a rehearing the court of civil appeals finds in accordance with the next above. The language of the opinion, however, overruling the motion shows that the court misunderstood the purpose for which we asked consideration of this circumstance as evidence. There is nothing in our motion or in our original brief which would indicate that we were asking that the fact that the railway company failed to call their agent, E. L. Traylor, as a witness, should be considered as a circumstance weighing in support of the verdict. It was not this at all. The evidence disclosed that E. L. Traylor, the agent, saw the accident, and, therefore, saw the deceased as he ran down in the path by the side of the train, and, as he fell and was killed. The evidence further disclosed that the railway company brought a photographer, R. O. Robinson, to the scene shortly [fol. 126] after the accident, and, that this eye witness pointed out to this photographer the hole or soft area over which the deceased had run. And the evidence disclosed that when this eye witness pointed out this spot to the photographer, the photographer immediately stepped in the hole for the purpose of seeing how much it would give under the pressure of his foot. The evidence did not disclose what the eye witness said when he pointed out the hole, but it did disclose what the photographer did at the time it was pointed out to him by the eye witness. Consideration of this was asked not because the railway company failed to call the witness, but because of what the photographer did

when the eye witness pointed out the hole or soft area to him.

While the court quoted the testimony of R. O. Robinson in the opinion referring to the testimony, his evidence is not fully quoted. The court quoted Mr. Robinson as having said stepping in the hole "might cause a man to stumble who was running and it might not", whereas, the witness said:

"If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment."

In this connection, attention is called to paragraph 7 of plaintiff's in error motion for rehearing, setting out said testimony and citing the transcript:

"The appellee objects and excepts to the following statement of the evidence in the opinion of the court:

" 'The nearest to it was by the witness Robinson, who said that in his opinion "it might cause a man to stumble who was running and it might not." '

because a correct quotation of the witness' testimony would be:

" 'I stepped in it to see how much it would give. As to whether or not it would give sufficiently to cause a man to lose his balance who was running, I will say that, in my [fol. 127] opinion, it might cause a man to stumble who was running and it might not. If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment.'

"Notwithstanding the opinion at another place quotes this evidence correctly, inasmuch as the court undertook further on to give a statement of the evidence we respectfully move and request that the court make a statement of the evidence, including all the witness said in this connection."

The Court of Civil Appeals held "that there is not sufficient causal connection shown between the soft area, hole or depression and the accident causing the death of the deceasd upon which to base a finding that the soft area proximately caused the deceased to fall and be injured", and reversed the judgment which had been rendered in the trial

court in favor of plaintiff in error and rendered judgment in favor of the defendant in error.

Grounds of Jurisdiction

This case is one as to which the jurisdiction of the Court of Civil Appeals is not made final, the damages sought to be recovered by plaintiff in error exceeding the sum of one thousand dollars, and is one of which the Supreme Court has jurisdiction, because errors of substantive law have been committed by the Court of Civil Appeals, which affect the judgment, and because there is a conflict between the decision in this case and prior decisions of the Supreme Court of Texas on questions of law material to the decision, as shown by the following particulars and assignments of error:

First Assignment of Error, Adopted as a Proposition

The Court of Civil Appeals erred in holding, as a matter of law, that there is not sufficient evidence to support the [fol. 128] finding of the jury that defendant's (defendant in error here) negligence was the proximate cause of the death of the deceased, and in overruling the first ground of appellant's (plaintiff in error here) motion for rehearing, complaining of said holding.

Second Assignment of Error, Adopted as a Proposition

The Court of Appeals erred in holding, as a matter of law, "that there is not sufficient causal connection shown between the soft area, hole or depression and the accident causing the death of the deceased upon which to base a finding that the soft area proximately caused the deceased to fall and be injured," and in overruling the second ground of appellant's (plaintiff in error here) motion for rehearing, complaining of said holding.

Third Assignment of Error, Adopted as a Proposition

The Court of Civil Appeals erred in holding as a matter of law, that there is not sufficient evidence to support the finding of the jury that defendant's (defendant in error) negligence was the proximate cause of the death of deceased, the evidence disclosing that the deceased, in the discharge of his duty, was running along the pathway toward the hole or

soft area and was last seen within a few feet of the hole, that a footprint, a short time after the injury, was found in this hole or soft area, that the footprint so found was going in the same direction he was seen to be running, that the soft place was directly in the path of deceased, and that he was bound to step in it or over it, that the footprint was a heavy print, that the toe of the footprint was deeper than the heel, that the footprint was made by a man running, that the place deceased fell under the train was about ten feet beyond the hole or soft area, just about the distance he would have fallen under the train if he had stumbled in the hole, that the witness R. O. Robinson, we had been brought to the scene [fol. 129] of accident by the defendant to take pictures, after having the hole or soft area pointed out to him by the railway company's agent, proved to be an eye witness, "stepped in it to see how much it w-uld give", and there being no evidence of anything, save the hole or soft area, to reasonably account for deceased falling beneath the train, all of said evidence conforming to plaintiff's in error allegations, and in overruling the third ground of appellee's (plaintiff in error here) motion for rehearing, complaining of said holding.

Fourth Assignment of Error, Adopted as a Proposition

The Court of Civil Appeals erred in holding, as a matter of law, "that there is not sufficient causal connection shown between the soft area, hole or depression and the accident causing the death of the deceased upon which to base a finding that the soft area proximately caused the deceased to fall and be injured", the evidence disclosing that the deceased, in the discharge of his duty, was running along the pathway toward the hole or soft area and was last seen within a few feet of the hole, that a footprint, a short time after the injury, was found in this hole or soft area, that the footprint so found was going in the same direction he was seen to be running, that the soft place or hole was directly in the path of deceased, and that he was bound to step in it or over it, that the footprint was a heavy print, that the toe of the footprint was deeper than the heel, that the footprint was made by a man running, that the place deceased fell under the train was about ten feet beyond the hole or soft area, just about the distance he would have fallen under the train if he had stumbled in the hole, that the witness R. O. Robinson, who had been brought to the

scene of accident by the defendant to take pictures, after having the hole or soft area pointed out to him by the rail-[fol. 130] way company's agent, proved to be an eye witness, "stepped in it to see how much it would give", and there being no evidence of anything, save the hole or soft area, to reasonably account for deceased falling beneath the train, all of said evidence conforming to plaintiff in error's allegations, and in overruling the fourth ground of appellee's (plaintiff in error here) motion for rehearing, complaining of said holding.

Fifth Assignment of Error, Adopted as a Proposition

The decision of the Court of Civil Appeals in reversing and rendering this cause on a holding, as a matter of law, that "there is not sufficient causal connection shown between the soft area, hole or depression and the accident causing the death of the deceased upon which to base a finding that the soft area proximately caused the deceased to fall and be injured" is in conflict with and holds differently on a material question of law from a prior decision of the Supreme Court of Texas in the case of Davis v. Preston, 16 S. W. (2d) 117, in which it is held as follows:

"There being direct evidence that defendant negligently left an obstruction in Preston's path, and there being direct and circumstantial evidence leading to the inference that he encountered the obstruction while discharging his duty and was thereby thrown to his death, the case is one where the jury drew a warranted inference from the facts."

And is in such conflict with another holding of the Supreme Court in the same case:

"With evidence disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and one-half feet from the end of the rail, with his duties requiring his next step to be made about where he would be tripped by the end of the rail, especially while combatting a thirty-five mile an hour wind, and with [fol. 131] his cap and lantern found about where he would have fallen upon his being tripped by the rail, and with his body actually caught and mangled between the cars as they proceeded a short distance further; there being no evidence of anything save the rail to reasonably account for Pres-

ton's fall beneath the train; we would not be justified in holding as a matter of law that a recovery should be denied on the issue of proximate cause."

Argument

Without going into a discussion of the evidence, the Court of Civil Appeals renders its opinion on the assumption that at the time the deceased was running along the pathway by the side of the trai. he was engaged in the discharge of his duties, and that the defendant in error was negligent in maintaining said pathway with a hole or soft place in it. It is only left to consider whether the testimony, direct and circumstantial, warrants the finding of the jury that the hole or soft place in the place of work was the proximate cause of deceased's death.

The evidence discloses that the deceased was running along the pathway toward the hole or soft place and was last seen within a few feet of the hole; that a footprint, a short time after the injury, was found in this hole or soft place; that the footprint so found was going in the same direction the deceased was seen to be running; that the soft place or hole was directly in the pathway of deceased; that he was bound to step in it or over it; that the footprint was a heavy print; that the toe of the footprint was deeper than the heel; that the footprint was made by a man running; that the place deceased fell under the train was about ten feet beyond the hole or soft area, just about the distance he would have fallen under the train if he had stepped in the hole and stumbled; that a witness who stepped in the hole to see if it would give testified: "If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my [fol. 132] judgment." That the witness R. O. Robinson, who had been brought to the scene of the accident by the defendant to take pictures, after having the hole or soft area pointed out to him by the railway company's agent, proved to be an eye witness, stepped in it to see how much it would give, and there was no evidence of anything, save the hole or soft area, to reasonably account for deceased falling beneath the train.

The Court of Appeals states that the evidence in the Davis-Preston case (16 S. W. (2d) 117 Supreme Court),

more clearly identifies the heel mark as that of Preston and the steel rails as causing his fall and injury, than the foot print in this case, and the soft ground as causing Moore's fall," and cites with emphasis that part of the supreme court's holding in the case embodying this language:

"There being no evidence of anything save the rail to reasonably account for Preston's fall beneath the train."

We modestly take issue with the Honorable Court of Civil Appeals and claim that the direct evidence and circumstances in this case make for a stronger showing of proximate cause than the direct and circumstantial facts in the Davis-Preston case. We invite and respectfully urge a study and comparison of the facts and circumstances in the two cases.

It is true the evidence shows, as the Court of Appeals claims, that the deceased, Moore, intended to get on the train. There is no evidence, however, that he actually made the attempt, and that he actually caught hold of the train, save, perhaps, the evidence furnished by his fall and injury.

On the other hand, the evidence shows and the court finds that there was a hole in the pathway and that the deceased was running in the pathway toward the hole and was last seen in a few feet of the hole. In addition to the fall, how-[fol. 133] ever, there are circumstances to show that he stepped in the hole and that the hole caused him to stumble and fall. The circumstances are that a footprint was found in the hole going in the same direction he was, and that the footprint was a heavy footprint, and made by a man running, and that the toe of the footprint was deeper than the heel, further evidencing the fact that it was made by a man traveling the same way the deceased was traveling and at the same gait. Then, too, the deceased was found about ten feet beyond the hole, about the distance he would have fallen after h[illegible]d stumbled in the hole. In the absence of any fact or [illegible] circumstance indicating that the deceased had caught hold of the train and fallen, these circumstances would certainly present a case "where the jury drew a warranted inference from the facts". Davis v. Preston, supra.

As pointed out in the statement of the case, E. L. Traylot, the railway agent, was an eye-witness to the accident. He saw the deceased pass over the hole and he saw the deceased fall. Shortly after the accident he pointed out to a company photographer the hole or soft area, and the photographer immediately stepped in it to see how much it would give. There was no evidence as to what the agent said, but the fact that the photographer, himself stepped in the hole for the purpose of seeing how much it would give is offered as a very strong circumstance weighing with the finding of the jury in this case that the deceased stepped in the hole and stumb'ed. Else why should the photographer make the experiment in question immediately following what the agent said to him when he pointed out the hole over which the deceased ran? The Court of Civil Appeals entirely mistook the purpose for which this circumstance was asked to be considered. We do not think any language in our original brief or in our motion for rehearing could be construed to mean that we were asking the court to con- [fol. 134] sider the fact that the railway company had failed to call the witness as a circumstance in support of this verdict.

To indulge the presumption that the deceased caught hold of a train moving too fast, and, was thrown under the train, would be to presume that the deceased was guilty of negligence, when the law presumes, in the absence of proof, that he was in the exercise of ordinary care. If the deceased is to be presumed as falling from the train while the same was moving slowly, there would, of necessity, be the further presumption that the deceased was careless while attempting to board, because the proof shows the deceased a very competent railroad brakeman. A competent, well qualified railroad brakeman does not fall when attempting to get on a slowly moving train, unless he is careless and negligent. Therefore, a presumption of negligence would, of necessity, have to be indulged.

If the train was moving fact, the presumption that he was thus injured would, of necessity, carry the presumption that he was negligent in undertaking to get on a fast moving train. Therefore, a presumption of negligence.

But there can be no presumption of the negligence of the employe. The contrary is true. The employe is presumed to have exercised ordinary care for his own protection.

Not only is this true, but it is proper for the jury to consider this presumption of care on the part of the injured employe as a circumstance in favor of his contention. The Supreme Court of Texas, in Railroad Company v. Luten, 228 S. W. 159, says:

"The presumption that the deceased exercised ordinary care for his own protection, and did not voluntarily place himself in a position of peril, is proper to be considered by the jury as a circumstance weighing in favor of the contention of the plaintiffs, and may have been so considered by the jury."

[fol. 135] In Hutcherson v. Amarillo Street Railway Company, 213 S. W. 931, the Commission of Appeals, says:

"In reaching a reasonable answer to this question it must be held in mind that the deceased is entitled to the presumption that he exercised due care for his safety, and that he did not voluntarily and negligently expose himself to danger. This presumption, favorable to the deceased, arises, since the evidence does not account for how the injury occurred and none saw him at the time of the accident. It is an element of evidence to be considered by the jury along with the other evidence in arriving at a conclusion on the facts."

In the case of I. & G. N. Railway Company v. Finger, 16 S. W. (New Series) 132, the Court of Civil Appeals at Austin had a similar question under consideration. There were circumstances showing that Mr. Finger fell from a box car. The contention was made that it was just as probable that he fell from a caboose. In discussing the matter, the court said:

"From which place or position was it more reasonable for the jury, under the facts and circumstances proved, to infer that he did fall? Certainly not from the caboose steps, because experienced brakemen only fall from a moving train upon the happening of an unusual occurrence, and no such occurrence was shown with reference to the caboose. Clearly the jury could have more reasonably inferred that he fell from the top of the train where a light answering the description of his lantern was seen to disappear at or near the very place his body was found."

In that case there were no circumstances to show that the fall was from the caboose. In this case there are no circumstances to show that the fall was from the train, or from catching hold of the train, and all of the circumstances show that the fall was from stumbling by stepping in the hole. [fol. 136] There being no evidence of negligence against the deceased, the presumption is indulged that he was in the exercise of due care. It is unnecessary to cite authorities. When applied to a given case, the presumption of due care means that whatever facts a party would have to prove in order to show due care, if the burden were on him to show it, are taken as true without any proof being offered. If the burden were placed upon plaintiff in error, in this case, to prove that deceased was in exercise of due care, plaintiff in error would have to prove that deceased did not take hold of the hand-hold or attempt to get on the train when it was running at such speed that an ordinarily prudent person would not have made the attempt. The presumption of due care, on the part of the deceased, then means that, prima facie, he did neither of those things. To say that the deceased undertook to get on the train when the brakeman, in the exercise of ordinary care, could and would do so, and, in some way, was caused to fall, is to speculate without evidence and without circumstance. To do so is not only speculating without evidence and without circumstance, but is doing so in the face of the evidence and circumstances showing the real cause of the fall.

Proof of proximate cause may be made by circumstantial as well as direct evidence.

The jury are entitled to draw all reasonable inferences from the direct testimony and from the circumstances proved in reaching their conclusion.

The burden is on the injured party to prove the negligence of his employer and that the negligence was a proximate cause of the injury. This burden is not the same as the burden required of the state in a criminal case. The burden on the plaintiff is described by the United States Supreme Court in D. L. & W. Railroad Company v. Koskey, 49 S. C. R., 202:

"The burden was on plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him [fol. 137] in respect of the place where he was injured, and

that, in whole or in part, his injuries resulted proximately therefrom."

The deceased was running along by the side of the train. Mr. Mayhon, who did not know him and did not know his wife, said that his actions indicated that he wanted to board one of the freight cars. He did not catch hold of any car. He did not leave the ground and did not lay his hands upon any car or upon any handhold, so far as this eyewitness saw.

The space between the side track and the main line track had been filled in and packed for the use of brakemen in discharging duties similar to the duty being accomplished by the deceased. Along this space and in the path closest to the side track the deceased was running with his flag in hand. According to the testimony of, it seems, all of the witnesses, this space between these tracks, which had been provided as a place for work for brakeman, was, apparently, smooth and packed and hard. The deceased continued to run along the side of the train without catching hold of the same, and a few feet beyond where he went out of sight of Mr. Mayhon, the eyewitness, his body was found under a box car. Along in the path used by brakemen, next the side track, a place was discovered which was described by the witnesses as a "soft place" as a "depression", and as "a hole filled in with cinders or soft substances and hadn't been packed down". About two hours after the deceased was killed young Leonard Mayhon saw a footprint, with the front part of the foot or shoe showing deeper than the other part of the print. It looked, to the witness, as if it had been made by a man running. This heavy footprint, made by a man running, was going in the same direction the deceased was traveling as he passed over this spot only a few seconds before his death. The size of the soft place [fol. 138] or hole is described by the witnesses as being three feet wide and ranging from four to ten feet in length. The deceased was traveling directly toward the hole, or soft place, and it was in his path, and he had to either step over it or step in it, of necessity, because he passed the hole before he was killed. The length of the hole would indicate that he probably stepped in it. This, in addition to the fact that after he was seen running across this hole, or soft

place, the heavy footprint of a man running was discovered in the hole he had passed over.

There were three witnesses who testified about seeing this hole, or soft place. Leonard Mayhon said it was a "soft place in the pathway over which the brakemen run", and, after giving its width and length and location, said "it was a hole filled in with cinders or soft substances and ha*n*d't been packed down". Irvin Smith said: "There was a soft place probably eight or ten feet before where he was killed. I stepped in the soft place myself. Compared to the footprint that I made and the one Leonard made, the footprint in there was a heavier one." He had already stated that there was a "noticeable footprint in the hole". R. O. Robinson, who went to the place of the accident with the railway company's cla-m agent and took pictures for the appellant, testified with reference to this hole or soft place. He said: "I also saw a hole or depression in the pathway there used by brakemen close to that place (meaning the place deceased was killed). I had that pointed out to me by the agent, Mr. Traylor." After this witness had testified that the agent, Mr. Traylor, who, the testimony shows, saw the accident, had pointed out to him the hole or depression in the path of brakemen, he stepped in the hole, according to his own testimony, to see how much it would give—"I stepped in it to see how much it would give." There was evidently something said at the time about this hole and its relation to the injury that would [fol. 139] cause the witness to step in it for the purpose of seeing how much it would give. This witness, who had been brought to the scene of the accident by the Railway Company, and who had taken the pictures used by the Railway Company in the trial, on being called, further testified that, in his opinion, if a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble. To quote the witness again: "If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment. That hole was right in the pathway."

In describing the footprint Leonard Mayhon said: "The footprint that I saw in there was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest."

The witness who described the hole or soft place further testified that it was the same color and had the same appearance of the other space between the tracks and that, in color and appearance, there was no difference between this and other parts of the pathway. Mr. Robinson had the hole, or soft place, pointed out to him by the agent of appellant—he did not discover it himself. Irvin Smith had the hole pointed out to him by Leonard Mayhon. Leonard Mayhon discovered the hole, or had his attention called to it, by stepping into it—"what first attracted my attention to this soft place was that I stepped in it myself, and that called my attention to it." According to the testimony of these witnesses, the hole was there, the soft place was there, and, as described in another way by Leonard Mayhon, the "hole which had been filled in with cinders or soft substance and hadn't been packed down", was there. But according to these same witnesses, this hole or this soft place was not obvious, but was very much like the surrounding space between the side track and the switch track, [fol. 140] and, like the balance of the pathway, next to the side track, used by brakemen.

Wherefore, it is prayed that a writ of error be granted herein, and that, on consideration of this cause, the judgment of the Court of Civil Appeals reversing and rendering the same be reversed, and that the judgment of the District Court be affirmed.

Turney, Burgess, Culwell and Pollard, El Paso, Texas, are the attorneys for the defendant in error.

Respectfully submitted.

(Signed) Winbourn Pearce, Walker Saulsbury, Temple, Texas, Attorneys for Plaintiff in Error.

[fols. 141-143] Bond on writ of error for $15,000, approved and filed November 29, 1929, omitted in printing.

[fol. 144] ORDER GRANTING WRIT—January 8, 1930

This day came on to be heard the appln. of plff. in error for a writ of error to the Court of Civil Appeals for the Eighth Dist. and the same having been duly considered, it

is ordered that the appln. be granted and the writ of error issue as prayed for.

[fol. 145] OPINION SUPREME COURT—Filed March 4, 1931

One J. W. Moore, now deceased, was the head brakeman on a freight train of the defendant Railway Company, running from a point in New Mexico to another point in the same state. At a place between these two points Moore fell under one of the cars of his train and was instantly killed. Mrs. Bertha Moore, surviving wife of the deceased, qualified as administratrix of deceased's estate in New Mexico, and as such administratrix, filed this suit for herself and her two minor children for damages growing out of the death of her said husband. Later Mack Saxon, plaintiff in error here, duly qualified as ancillary administrator and personal representative of deceased's estate and intervened in the suit. Trial was had in the district court before a jury and resulted in a judgment for Saxon in his representative capacity. The Railway Company duly appealed to the Court of Civil Appeals for the Eighth District at El Paso, which court reversed the judgment of the district court and rendered judgment for the Railway Company. 21 S. W. (2d) 686. Writ of error was granted to this court on application of Saxon.

We copy the following statement from the opinion of the Court of Civil Appeals:

"Appellee Saxon alleged the death of J. W. Moore, that he was killed at Tolar, New Mexico, while in the discharge of his duties as head brakeman of appellant railway company, without fault on the part of J. W. Moore, deceased; [fol. 146] that appellant was a common carrier engaged in interstate commerce; that the deceased, Moore, received the injuries resulting in his death while in appellant's service handling interstate commerce, and that the injuries to and the death of J. W. Moore, deceased, were proximately caused by the negligence of appellant railway company and assigned several acts of negligence, among them the fast running of the freight train, and rough handling; however, the only one submitted by the trial court to the jury being alleged, substantially, as follows: At said time and at the

station Tolar, J. W. Moore, the deceased, had thrown the switch, permitting the entrance of said freight train into said side or passing track, and had, with a flag in his hand, as his duty required, proceeded up the main line track for the purpose of flagging an incoming passenger train, and that as the freight train entered onto the side or passing track, and proceeded to the other end of the track, J. W. Moore, deceased, as required by his duty, crossed over to the side of said freight train for the purpose of boarding the same, and riding to the further end of the side track, in order to be in better position to discharge the duties required of him with reference to the flagging of said passenger train; that on the side of the passing track or switch track next to the main line, is a well marked and beaten path, wherein brakeman and trainmen in discharge of like duties, traveled. That the deceased, J. W. Moore, in the discharge of his duties, was walking and running in said pathway, and while so engaged, by reason of a large hole or soft place in said pathway, was caused to be thrown or fall under said train, and killed.

"The specific negligence assigned is alleged to be in causing or making a hole or depression in the said pathway and maintaining and keeping said hole and depression and soft place in said pathway; and thereby negligence in fail- [fol. 147] ing to furnish deceased a reasonably safe place to work.

"In addition to the general denial, appellant plead, in substance, that deceased, Moore, was an experienced brakeman who knew the location of the tracks and the purpose of the train movement at the time of the accident; that he was familiar with the pathway in question, knew the speed of the passing freight train, and that if he undertook to get on the train on the passing track he did so voluntarily, and merely to serve a purpose of his own; that his duties did not require him on the train at that time, and that none of the other employees expected that he would attempt to get on the train; that his only duty was to remain on the ground and close the switch after the passenger train had passed; that if he put himself in a position of danger, he did so voluntarily. Appellant plead assumed risk and negligence on the part of the deceased under and in respect to the circumstances and facts as set up.

"The case was submitted to the jury on special issues. After the evidence was heard and before its submission appellant presented its motion for an instructed verdict, which was refused. Appellant's motion for judgment on the answers returned was likewise refused. Judgment was entered for appellee on the answers of the jury on the issues submitted.

"On the issues submitted the jury made the following findings:

"1. At the time and place alleged by plaintiff (appellee) there was a soft area or hole between the tracks of the defendant's lines, as alleged by plaintiff.

"2. The deceased, J. W. Moore, was running along the track, as alleged, and while doing so and attempting to board one of the cars with which he was working he stepped on or upon such soft area or hole and was thereby caused to fall and be injured.

[fol. 148] "3. The presence of such soft area or hole was due to the negligence of the defendant.

"4. Such negligence was a proximate cause of the accident and injury to the deceased, J. W. Moore.

"5. Deceased, J. W. Moore, did not know of such soft area or hole and by the use of ordinary care incident to his employment would not have known of it.

"6. The accident or injury to the deceased complained of was not due to some other risks of the employment assumed by the deceased.

"7. States the reasonable compensation appellee is entitled to recover as the damages sustained.

"On the verdict of the jury the court entered judgment for appellee and against appellant for the amount of damages found."

From the above statement it is evident that plaintiff in error recovered in the trial court on the theory that the deceased, while in the discharge of his duties as a brakeman, was running along by the side of the track of the Railway Company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped

on or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed.

We here call attention to the fact that this action is brought under the Federal Employers' Liability Act, and the rights and obligations of the parties depend upon such act, and the principles of the common law as applied by the Courts of the United States. Under such act it is essential that the plaintiff establish negligence on the part of the railway company as the cause of the injury. Toledo St. L. & W. R. R. vs. Allen, 276 U. S. 165.

We are of the opinion that the evidence quoted by the Court of Civil Appeals, and some further facts shown in the record, are sufficient in law to sustain the finding of the [fol. 149] jury as regards the cause and manner of deceased's death. Davis, Federal Agent, vs. Preston, 264 S. W. 331 (Civ. App.), Id. 16 S. W. (2d) 117 (Sup. Ct.).

As we understand the opinion of the Court of Civil Appeals, that court reverses the judgment of the district court, and renders judgment for the Railway Company on the theory that there is no evidence in the record sufficient in law to sustain the finding of the jury that the hole or soft place in the place of work was the direct and proximate cause of J. W. Moore's death. The evidence in the record on this question discloses that while in the discharge of his duties, the deceased, who was an experienced brakeman, was running along the pathway beside the track on which his train was running, and toward the hole or soft place in such pathway; that when last seen he was within a few feet of such hole or soft place; that a short time after the injury a foot print was found in such hole or soft place; that such foot print was going in the same direction as the deceased; that such soft place or hole was directly in the pathway of deceased; that deceased was bound to step in or over such hole or soft place; that the above mentioned foot print was a heavy one, and made by a man running; that the place where deceased fell under the train was about ten feet beyond the hole or soft place, and just about the distance deceased would have fallen if he had stepped in such hole or soft place and stumbled; and that such hole or soft place was the only thing shown which could probably have caused deceased to fall. In this connection we call attention to the fact that one of the witnesses who ex-

amined the hole or soft place and himself stepped into it, testified:

"If a man was not looking and didn't know it was there and stepped in it, it could easily cause him to stumble, in my judgment."

It is true that the evidence shows, as found by the Court of Civil Appeals, that deceased intended to get on the [fol. 150] train, but we are unable to find any evidence in the record, and none has been pointed out to us, showing as a matter of law that he actually made the attempt, that is, that he actually caught hold of the train. On the other hand, there is circumstantial evidence to, in law, support a fact finding that he was caused to stumble and fall under the train by stepping into the hole or soft place in the pathway along the side of the track and in which pathway he was running. This issue was fairly presented to the jury and found as above stated.

We recommend that the judgment of the Court of Civil Appeals be reversed, and the judgment of the district court affirmed.

Richard Critz, Judge.

[Title omitted]

Judgment of the Court of Civil Appeals is reversed, and that of the District Court is affirmed, as recommended by the Commission of Appeals.

C. M. Cureton, Chief Justice.

March 4, 1931.

[fol. 151]

No. 5601. No. 1409

Mack Saxon, Admr., etc.,

vs.

A. T. & S. F. Ry. Co.

From El Paso Co., 8th Dist.

Judgment Entered—March 4, 1931

March 4th, 1931.

This cause having been referred to the Commission of Appeals for their examination and report and said Com-

mission having reported in a written opinion by Honorable Richard Critz, Judge of Section "A", that there was error in the judgment of the Court of Civil Appeals but no error in that of the District Court, and recommending that the judgment of the Court of Civil Appeals be reversed and that of the District Court be affirmed, and said report together with the record in the cause having been duly considered and the judgment as recommended by the Commission of Appeals having been approved by the court, it is therefore ordered, adjudged and decreed that the judgment of the Court of Civil Appeals be reversed and the judgment of the District Court be in all things affirmed. That the plaintiff in error, Mack Saxon, Personal Representative in Texas and Ancillary Administrator of the estate of J. W. Moore, dec'd., do have and recover of and from the defendant in error, Atchison, Topeka & Santa Fe Railway Company, and sureties J. E. Benton and Joshua S. Raynolds, the amount adjudged in the District Court together with all costs in this behalf expended in this court, the Commission of Appeals and Court of Civil Appeals, and this decision be certified to the District Court for observance.

[fol. 152] IN THE SUPREME COURT OF TEXAS, COMMISSION OF APPEALS, SECTION A

No. 1409-5601

[Title omitted]

MOTION FOR REHEARING—Filed March 16, 1931

Comes now defendant in error, Atchison, Topeka & Santa Fe Railway Company, and represents that error was committed by the judgment and opinion of this Honorable Court, wherein and whereby the judgment entered by the Court of Civil Appeals, Eighth Supreme Judicial District, was reversed and that of the District Court of El Paso County affirmed, and thereon defendant in error would respectfully show:

I

This Court erred in its holding to the effect that there was sufficient evidence in the record as to the negligence

of the Railway Company at the time and place of accident to justify the submission of this cause to a jury, and to justify the judgment entered thereon by the District Court of El Paso County.

II

The Court erred in its judgment reversing the judgment of the Court of Civil Appeals of the Eighth Supreme Judicial District because there was an utter failure in the evidence to show with that certainty required how the accident in question happened.

[fol. 153]

III

The cause of action, if any, arose under the Federal Employers' Liability Act, and thereunder the burden was upon the plaintiff in the action to establish the cause of the accident, and before a liability can be fixed thereunder the plaintiff must establish negligence on the part of the defendant Railway Company proximately causing the death of deceased. This burden was not met, and because of which this Court erred in reversing the judgment of the Court of Civil Appeals and affirming that of the District Court of El Paso County, Texas.

IV

The only facts established herein are:

(a) Deceased was an employe of the defendant, an interstate carrier engaged in interstate commerce at the time of the accident;

(b) He was killed while engaging in that service. The rest of the case, as made by the plaintiff on the trial, is dependent upon surmise and conjecture, which is wholly insufficient to fix liability against the defendant under the provisions of the Employers' Liability Act.

V

The evidence does not show what caused the death of the deceased, which is fatal to the right of recovery under the Federal Employers' Liability Act, and this court erred in not so holding.

VI

The burden of proof was on the plaintiff to show negligence on the part of the defendant, and that such negligence was the proximate cause of the death of deceased. This is the construction placed upon the Federal Employers' Liability Act by the Supreme Court of the United States, and should have been the holding of this Court in the present case, and so holding there was no right of re-
[fol. 154] covery herein and the judgment of the Court of Civil Appeals should have been affirmed.

VII

The defense of assumed risk under the provisions of the Federal Employers' Liability Act is complete, and the injuries resulting in death, made basis of this action, resulted from risks assumed by the deceased, and this Honorable Court erred in not so holding.

VIII

The fact that deceased was killed does not, under the provisions of the Federal Employers' Liability Act, import a liability therefor against the Railway Company, and no inference of negligence may be indulged from the accident itself, and this Court erred in holding that under the facts appearing negligence could be inferred. There are no inferences permissible under the provisions of the applicable Act of Congress.

IX

There is no evidence that deceased stepped in a soft place and was caused to fall, and the fact, if it be one, that there was the print of a shoe in a soft place gave no right to the Court to indulge a presumption in favor of deceased in that behalf. Such conclusion is based merely on surmise, which is wholly insufficient to establish a material fact under the provisions of the Federal Employers' Liability Act.

X

Were you to concede, which you are not warranted in doing, that deceased did step in a soft spot, there is no evidence to show that this caused him to fall and be killed.

You are required to build one presumption on another to reach the conclusion made basis of your opinion, which is wholly insufficient, and you committed error in so holding.

[fol. 155] XI

This Honorable Court held that there is circumstantial evidence to, in law, support a fact finding that he (deceased) was caused to stumble and fall under the train by stepping into the hole or soft place in the pathway alongside of the track, and in which pathway he was running. If a recovery under the provisions of the Federal Employers' Liability Act may be predicated upon circumstantial evidence, which we do not concede, yet when so predicated each link in the chain of circumstances must so connect, the one with the other, as to lead unerringly to one conclusion. There is no such connection in the alleged chain of circumstances here as to warrant in law the inference indulged by this Court. The evidence discloses that other people had used that pathway on the morning in question prior to the discovery of the footprint in the alleged soft place. The evidence does not show the size of the footprint, nor the size or character of shoe worn by deceased. The whole thing is predicated on surmise, which is wholly insufficient, and this Court erred in its contrary conclusion.

Defendants in error represent that Messrs. Winbourn Pearce and Walker Saulsbury, the post office address of each of whom is Temple, Texas, are the attorneys of record herein for plaintiff in error, and this motion for rehearing is respectfully submitted by defendant in error, and thereon it is asked that a rehearing herein be granted, the judgment heretofore entered by this Honorable Court set aside and that of the Court of Civil Appeals of the Eighth Supreme Judicial District be in all things affirmed.

Respectfully submitted,

Turney, Burges, Culwell & Pollard, A. H. Culwell,
Attorneys for Defendant in Error.

Postoffice Address of Attorneys for Defendant in Error:
El Paso, Texas.

[fol. 156] WAIVER OF MOTION—Filed March 16, 1931

Winbourn Pearce, Attorney-at-Law, Temple, Texas

March 16th, 1931.

Mr. F. T. Connerly, Clerk Supreme Court, Austin, Texas.

DEAR FRED: Two weeks ago Wednesday, the Supreme Court reversed the Court of Civil Appeals at El Paso and affirmed the judgment of the lower court of Saxon vs. A. T. & S. F. Railway Company. If the motion for a rehearing reaches you in time, I wish you would submit it Wednesday without waiting for service on me. You may just mail the copy of the motion and go ahead with the submission.

I am enclosing you check for $2.00 in payment of copy of the opinion, for which I thank you very much.

Yours very sincerely, Winbourn Pearce.

WP:FH.

[fol. 157] COMMISSION OF APPEALS, SECTION A

Motion No. 9518. No. 1409-5601

[Title omitted]

OPINION ON MOTION FOR REHEARING—Filed May 20, 1931

The Railway Company in its motion for rehearing earnestly insist that there is an utter failure of evidence in the record to show how the accident in the instant case happened. We have again carefully examined the statement of facts, and still adhere to the holding in our original opinion that the evidence raises a fact issue as to how the accident was produced. In this connection, however, we withdraw the last paragraph of the original opinion, beginning with the words, "It is true that the evidence shows", etc., and ending with the words, "This issue was fairly presented to the jury and found as above stated" and substitute therefor the following:

There is warrant in the evidence for the inference that the deceased intended to get on the train, but we are unable to find any evidence in the record, and none has been pointed

out to us, showing that he actually made the attempt; that is, that he actually caught hold of the train. On the other hand, there is circumstantial evidence to, in law, support a fact finding that he was caused to stumble and fall under the train, by stepping into the hole or soft place in the pathway along the side of the track and in which pathway he was running. This issue was fairly presented to the jury and [fol. 158] found as above stated. Nor can it be said that the inference of taking hold of, and falling from the train, was equally as warranted as the finding made by the jury. The evidence places the deceased, when last seen, in the pathway running toward the soft place, where the footprint was found, and, within a few feet of same. It would be a more reasonable inference that the deceased continued in what he was actually doing for the few additional feet necessary to travel, than that he changed his course and took hold of and was thrown from the moving train. Moreover, "it is presumed that deceased proceeded with due care," (A. T. & S. F. Railway Co. vs. Toops, 281 U. S. 351), and that he "did not voluntarily place himself in a position of peril", (Railway Company vs. Luten, 228 S. W. 159, Supreme Court of Texas), which presumption "is properly to be considered by the jury as a circumstance weighing in favor of the contention of the plaintiffs, and may have been so considered by the jury" (same case last cited).

We recommend that the motion for rehearing be in all things overruled.

Richard Critz, Judge.

[fol. 159] [Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—Entered May 20, 1931

It is ordered that the motion for rehearing herein by the defendant in error be and the same is hereby overruled as recommended by the Commission of Appeals with written opinion by Hon. Richard Critz.

[Title omitted]

ORDER GRANTING STAY OF MANDATE—June 10, 1931

Motion for stay of mandate granted, and it is ordered by the Court that the stay be for six months from June 10th, 1931.

[fol. 160] Clerks' certificate omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1302)